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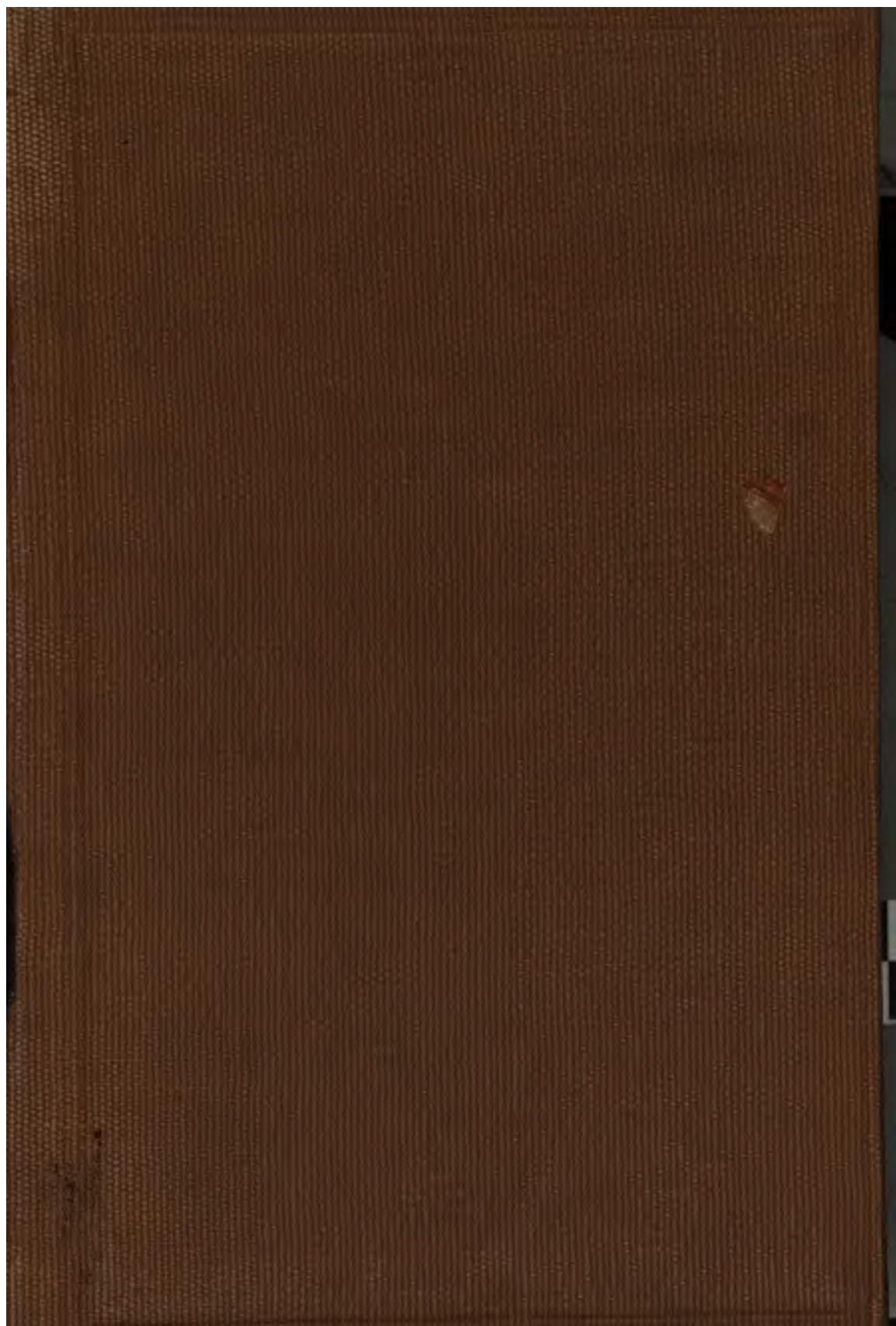
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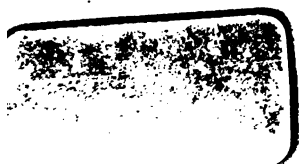
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REPORTS  
OF  
CASES ARGUED AND ADJUDGED  
IN THE  
Supreme Court of Florida,

AT  
TERMS HELD IN 1858-'9.

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By MARIANO D. PAPY, REPORTER.

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VOLUME VIII.

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1859



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**Judges of the Supreme Court**  
**DURING THE PERIOD OF THESE REPORTS.**

---

HON. THOMAS BALTZELL, CHIEF JUSTICE.  
HON. BIRD M. PEARSON, }  
HON. CHARLES H. DUPONT, } ASSOCIATE JUSTICES.

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MARIANO D. PAPY, ATTORNEY GENERAL.

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**Judges of the Circuit Courts.**

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HON. B. A. PUTNAM, JUDGE EASTERN CIRCUIT.  
HON. THOS. F. KING, JUDGE SOUTHERN CIRCUIT.  
HON. J. WAYLES BAKER, JUDGE MIDDLE CIRCUIT.  
HON. JESSE J. FINLEY, JUDGE WESTERN CIRCUIT.



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DECISIONS  
OF THE  
Supreme Court of Florida,  
AT  
TERMS HELD IN 1858.

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JAMES BURK, APPELLANT, *vs.* ALBERT CLARK, APPELLEE.

1. Where the instruction of the judge below is relevant to the issue joined, and exception is taken thereto, all the evidence upon which the instruction is based, must be incorporated in the bill of exceptions which accompanies the record.
2. In a common law suit, the only means of bringing before the Appellate Court the evidence used in the Court below, is by incorporating it in the bill of exceptions which accompanies the record.
3. It is a settled rule of law, that every presumption is in favor of the ruling of the Court below, therefore where a party excepts to such ruling, and fails to bring up the evidence upon which the ruling is based, this Court will refuse to consider the exception.
4. The omission to add the "similiter" or to plead to a particular count, where the issue has been joined upon other counts of the declaration, affords no ground for a writ of error.

This case was decided at Tampa.

This was an action on the case for slander, instituted in

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Burk vs. Clark.—Statement of the Case.

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Hillsborough Circuit Court by the appellee against the appellant. The declaration contained two counts, the second of which was afterwards by leave of the Court amended. The defendant pleaded not guilty to the first count—a jury was empannelled and sworn “well and truly to try, and the truth to speak upon the issue joined,” who returned a verdict for the plaintiff and assessed his damages at the sum of three hundred and seventy-five dollars, upon which judgment was rendered.

The defendant below asked the court to instruct the jury as follows:

1st. That if the jury find from the testimony, that the slander alleged in the declaration was spoken by the defendant in the month of March or April, A. D. 1854, then they must find for the defendant.

2nd. That unless it was proven that the defendant spoke the words alleged in the declaration in the hearing of citizens of Florida, then they must find for the defendant.

3rd. That if the plaintiff proved that the defendant said that the plaintiff had stolen his hogs, then he must prove in addition to that, that he, the defendant, meant thereby that the plaintiff was guilty of larceny, and if this is not proven, then they should find for the defendant.

4th. That the plaintiff must prove the charge as he stated it in his declaration, and therefore testimony which states that the defendant spoke in the alternative, that is to say, that the defendant spoke one thing or the other, is not sufficient to sustain the declaration.

5th. That the jury must not, when they are making up their verdict whether the defendant is or is not guilty, take into consideration any of the testimony which does not directly go to prove the charges as they are alleged in the plaintiff's declaration.

6th. That unless the plaintiff proves that the slander was

spoken in the presence of more than one citizen, then they must find for defendant.

The Court refused to give the 1st, 2d, 3d and 6th instructions prayed for, to which ruling the defendant's counsel excepted.

The Court gave the 4th instruction with the addition, "but the jury may take such testimony into consideration in estimating the damages, should they find for the plaintiff." The Court gave the 5th instruction with the addition, "but the jury may take into consideration if they find for the plaintiff any evidence of words spoken by the defendant of the plaintiff to show malice on the part of defendant, and in aggravation of the damages." To giving which instructions by the Court, the defendant's counsel excepted, which rulings and instructions of the Court are signed, sealed and made a part of the record.

THOS. F. KING, *Judge*.

No bill of exceptions is incorporated in the record, but several sets of depositions are inserted unattested by the signature of the Judge.

The first and second of the errors assigned by the appellant, are based upon the instructions given and refused by the Court below.

The third error assigned is, that "the Court erred in giving a judgment on the verdict of the jury, because there was no similiter filed to the defendant's plea to the first count of plaintiff's declaration, and because there was no plea to the second amended count of plaintiff's declaration."

The fourth error assigned is, "because the jury were not sworn to give a true verdict."

*Gettis and Mitchell*, for Appellant.

*Rogers and Hart*, for Appellee.

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Burk vs. Clark.—Opinion of the Court.

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DUPONT, J., delivered the opinion of the court.

This was an action on the case for slander, brought in the Circuit Court of Hillsborough county by the appellee against the appellant. The jury gave a verdict in favor of the plaintiff below upon which verdict judgment was entered, and it is from that judgment that the appeal is brought to this Court.

The two first errors assigned refer exclusively to the instructions which were severally given and refused by the judge in the Court below. These instructions purport to have been given in writing and attested by the signature of the judge, and seem to have been relevant to the issue joined between the parties, but the record presents no bill of exceptions setting forth the evidence upon which the instructions were given or refused. There are in the record several sets of depositions which are apparently applicable to this case, but this Court has repeatedly ruled, that evidence brought forward in this loose way is wanting in that degree of verity, which is necessary to commend it to consideration, and that such verity is attainable only by its incorporation into a bill of exceptions properly attested by the signature of the judge who may have presided at the trial of the cause. Such instructions as are relevant to the issue must always be based upon some portion of the evidence adduced upon the trial, and to enable the Appellate Court to decide upon the correctness of the ruling which either grants or refuses the instruction, it is evident that resort must be had to that evidence. It is also a settled rule of law that every presumption is in favor of the correctness of the ruling of the Court below, and, in order to induce the appellate tribunal to reverse such ruling, it must be made manifest that an error has been committed. The Appellate Court will never resort to conjecture on

such a point. For these reasons we are constrained to overrule the first two errors assigned.

The third error assigned is in the following words, viz: "The Court erred in giving a judgment on the verdict of the jury, because there was no *similiter* filed to the defendant's plea to the first count of plaintiff's declaration, and because there was no plea to the second amended count of plaintiff's declaration." We doubt whether, even at common law, error could be predicated upon either of the grounds set forth in his assignment. But, be that as it may, our statute (Thompson Digest, p. 351, § 2,) has provided that "no judgment, after the verdict of a jury or an award of arbitrators shall be stayed or reversed for any defect or fault in the original writ, or for any variance between the writ and declaration, or for any misleading, insufficient pleading or misjoining of the issue, or for any faulty count in a declaration, where the same declaration contains one count or more which is or are good," &c. The third error assigned is therefore overruled.

The fourth and last assignment is, "because the jury were not sworn to give a true verdict." Upon a reference to the record, we find that the jury were "sworn well and truly to try and the truth to speak upon the issues joined." This mode of swearing the jury is as formal as there can be any necessity for, and we are at a loss to perceive the force of the objection presented in the assignment. The fourth assignment is therefore overruled also.

Let the judgment of the Circuit Court rendered in this case be affirmed.

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Tompkins vs. Eason.—Opinion of Court.

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JOHN TOMPKINS, PLAINTIFF IN ERROR, *vs.* NEEDHAM W.  
EASON, DEFENDANT IN ERROR.

Where the error assigned is the refusal of the Court below to grant a new trial, in order to enable this Court to judge of the correctness of that ruling, all the evidence used at the trial must be brought up by a bill of exceptions.

This case was decided at Tampa.

The plaintiff in error instituted his suit by attachment against the defendant in error in Hillsborough Circuit Court, at the fall term 1856, a trial was had, and the jury having returned a verdict for the defendant, a judgment was thereupon entered by the court.

At the same term a motion was made by the plaintiff for a new trial, on the ground that the verdict of the jury was contrary to the evidence. The court below overruled the motion, and the plaintiff by his counsel excepted.

No bill of exceptions is incorporated into the record. Several sets of interrogatories and depositions purporting to be applicable to the case are inserted, but the same are unattested by the signature of the judge below.

*Rogers and Hart*, for Plaintiff in Error.

*Jas. Gettis*, for Defendant in Error.

DUPONT, J., delivered the opinion of the Court.

This suit was commenced by the plaintiff in error against the defendant by process of attachment, and judgment was given therein for the defendant upon a verdict of the jury at the Fall Term 1856, of the Circuit Court of Hillsborough county. From that judgment an appeal has been taken to this court, and the only specific error assigned for a

reversal is, that the Circuit Court erred in overruling the motion for a new trial.

In looking into the record, we find that the plaintiff's counsel did make a motion in the Court below for a new trial, upon the ground that "the verdict of the jury was contrary to the evidence," which motion was overruled by the Court. Now, it is perfectly clear, that to enable the Court to pronounce upon the correctness of that ruling, resort must be had to all the evidence which was before the jury at the trial; but there is a total absence of a bill of exceptions, or of anything purporting so to be; and as the evidence can be brought up only by being incorporated in the bill of exceptions, there is consequently nothing upon which this court can act, in order to guide them to any conclusion. This being the case, they are constrained to presume that the only ruling of the Court below was correct.

It is true that the record contains a large mass of what purports to be the evidence that was used upon the trial of the cause, consisting of several sets of depositions of divers witnesses, but this Court has repeatedly ruled that evidence brought up in this loose way will not be considered—that to commend it to the consideration of the Appellate Court, it must be incorporated into a "bill of exceptions," *attested* as is provided for by the statute—(Thomps. Dig., p. 357, Sec. 3, §1—Proctor vs. Hart, 5 Fla. R. 465.

Let the judgment of the Circuit Court be affirmed.

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Fash vs. Clark & Ferris.—Opinion of Court.

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LEONARD FASH, APPELLANT, v'S. CLARK & FERRIS, APPEL-  
LEES.

1. Where exception is taken to an instruction given by the judge below, it ought, with the evidence upon which it is based, to be incorporated in the bill of exceptions accompanying the record.
2. Where the instruction complained of has not been incorporated in the bill of exceptions, but, as presented by the record, purports to have been in writing, duly attested by the signature of the judge who presided at the trial, if the same be manifestly irrelevant to the issue joined between the parties and calculated to mislead the jury, this Court will consider and pronounce upon it.

This case was decided at Tampa.

The facts of the case are fully set out in the opinion of the Court, to which reference is made.

*James T. Magbee* for appellant.

*James Gettis* for appellee.

DUPONT, J., delivered the opinion of the Court.

This is an appeal from the Circuit Court of Hillsborough county.

There exists so much confusion in the record filed in this cause, and the bill of exceptions itself is so loosely drawn, that it has been with extreme reluctance that the Court has consented to consider the case. We deem this a proper occasion to admonish the members of the bar throughout the State of the necessity of giving greater attention to these particulars, lest the Court should find itself constrained, in the vindication of its rules, to inflict the appropriate penalty—a refusal to decide the causes so brought up. By extreme labor we have been enabled to extract from the record the following state of the case:

On the 11th day of July, A. D. 1853, Leonard Fash, the appellant, procured to be issued from the office of the Clerk of the Circuit Court of Hillsborough county a writ of attachment against the goods and chattels of Williamson, Zaratin & Co. for the sum of \$1,720.20, which was made returnable to the ensuing fall term of the said Court. At the same time a writ of garnishment was also issued out of the same office, and returnable at the same time, which was directed to "Henry N. C. Clark and William G. Ferris, under the name and style of Clark & Ferris," requiring them to answer what goods and chattels, rights and credits, money or effects were in their hands, custody or control, at the time of the service of the writ, belonging to the defendant in the attachment. The record shows that the writ of garnishment was served on the day that it bears teste upon William G. Ferris, one of the partners in the firm of Clark & Ferris. At the fall term, A. D. 1854, the plaintiff obtained a judgment against the *defendant in attachment* for the sum of \$1,848 13, which, by consent of parties, was ordered to be stayed. At the same term of the court, William G. Ferris, one of the firm of Clark & Ferris, filed his answer in response to the writ of garnishment, showing a balance against themselves on a settlement of accounts between their house and the house of Williamson, Zaratin & Co. to the amount of \$662 68. The answer goes on to state that "the above balance of \$662 68, *Clark & Ferris owe to some person or persons in New Orleans*, and alleges an apprehension that there might be some difficulty about its appropriation. This answer being deemed evasive, the plaintiff moved for and obtained a judgment by default against the garnishees at the same term. On the 14th of April, 1855, the default

was opened, upon motion of the garnishees, and simultaneously therewith, William G. Ferris filed a second answer in response to the original writ of garnishment. In this answer he commences by saying, "That at the time of the service of the writ of garnishment, or at any time since said service, he was and is not indebted *in his individual capacity* to the said James Williamson, as surviving partner aforesaid, to the value of one cent, but that the late firm of Clark & Ferris was indebted to the said James Williamson, as surviving partner aforesaid, at the time of the service of the said writ on him, to the amount of six hundred and sixty-two dollars and sixty-eight cents." To this answer the plaintiff filed a traverse in the following words, to wit: "And the said plaintiff, by James T. Magbee, alleges that the answer of William G. Ferris, garnishee, as to his own indebtedness and the indebtedness of Clark & Ferris, garnishees, has not discovered the true amount of debt due from him and them to the defendant James Williamson, surviving partner of Williamson, Zaratin & Co., at the time of the service of said summons, and this plaintiff prays may be enquired of by the country," &c. This issue was submitted to the jury, accompanied by a mass of testimony in the form of depositions, but which, not having been embodied in the bill of exceptions, this Court is not at liberty to consider. The Court then instructed the jury as follows: "That if they believed from the evidence that there was no indebtedness from Ferris, the garnishee, individually to Williamson, surviving partner of Williamson, Zaratin & Co., they should find for the garnishee; and that they should not take into consideration evidence to prove an indebtedness of Clark & Ferris to Williamson, Zaratin & Co." Under this instruction, the jury found a verdict for the garnishee,

and judgment was accordingly entered up. It is from this judgment that the appeal is taken, and the only error assigned which it is necessary for us to consider is that excepting to the instruction to the jury.

This is a succinct statement of the true facts of the case which we are called upon to decide, picked out from amongst a large mass of matter which has been incorporated into the record, but which will be hereafter shown to be entirely irrelevant and wholly *dehors* the case.

The instruction of the court below purports to have been in writing, duly attested by the judge who presided at the trial, and although not incorporated into the bill of exceptions, as it should have been, yet, bearing the attestation that it does, we have consented to accord to it full and perfect verity. The bill of exceptions is also defective is not embracing the evidence upon which the instruction is based, but the omission in this connection is not material, as this case comes precisely within the exception mentioned in the opinions delivered in the two cases decided at this term of the court, of "McKay vs. Friebele" and "McKay vs. Bellows," viz: where the instruction is without the limits of the issue between the parties and is calculated to mislead the jury in considering of the verdict to be given. It is only necessary to refer to the terms of the instruction given in this case, and it will be manifest that it exceeded and indeed was wholly inappropriate to the true issue to be decided, and that it was well calculated to mislead the jury, and that it did in fact cause them to return a verdict most manifestly erroneous. It is true that in the traverse to the answer of Ferris the pleader very improperly took issue upon so much of the answer as denied his *individual* indebtedness, but this was clearly immaterial and should have been so treated by the Court. The tra-

verse did in terms make an issue as to the amount of indebtedness due *by the firm of Clark & Ferris*, and that was the true and only issue correctly before the jury, and, if any instruction was necessary to be given, it should have been confined to that issue. It is, therefore, the opinion of the court that the learned judge who presided in the court below, in the instruction which he gave to the jury at the trial of the cause, did err to the injury of the plaintiff's rights, and that a new trial ought to be granted to him.

The confusion which this record presents occurred entirely from a misapprehension of the plaintiff's attorney, that the mistake of the Clerk of the Circuit Court, in making out the writ of *scire facias*, which issued for the purpose of confirming the judgment by default previously taken in the original attachment suit, had compromised his claim against the garnishees Clark & Ferris. That writ went out against Ferris individually, instead of being against the firm, as the judgment by default was. Upon the discovery of the mistake, the counsel for plaintiff made several motions, supported by several affidavits, to have the mistake corrected, all of which motions were refused by the court.

Whatever may be said with respect to the correctness of these rulings of the judge, it is very manifest that the issuing of the writ of *scire facias* against Ferris in his individual capacity, could by no means affect the suit which was then pending between the plaintiff and the *firm* of which Ferris was a partner, and especially was this the case after the judgment by default had been opened at the instance of the defendants, Clark & Ferris. It is manifest that the opening of the default operated to remit the case back to the position which it occupied at the date of the taking of the default. Down to that period there had been

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McKay vs. Friebele.—Statement of Case.

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no error in the proceedings upon the garnishment, at least none has been brought to our notice. The writ of garnishment which had been previously issued was against the firm, and the answer of Ferris upon which the issue was joined was in response to that writ, so that, even if there had occurred any departure in pleading or mistake in the issuing of process between the service of the writ of garnishment and the joining of the issue, it had all been cured or obviated by the setting aside of the default and the consequent reinstatement of the cause to its original position of a suit between the plaintiff and the firm of Clark & Ferris.

Upon a full consideration of all the facts of this case, it is ordered and adjudged that the judgment rendered therein be reversed, the cause remanded and that a new trial be granted in the Court below.

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JAMES MCKAY, PLAINTIFF IN ERROR, *vs.* CHRISTOPHER L.  
FRIEBELE, DEFENDANT IN ERROR.

1. Where the demurrer is to the whole declaration, and it is found to contain one good count, the judgment on the demurer must be for the plaintiff.
2. A variance between the amount of damages laid in the *præcipe* and that in the declaration, affords no ground upon which to predicate a writ of error.
3. Where an amendment in matter of form is allowable, this Court will give to the party entitled to the amendment the full benefit of it, as though it had been actually made.
4. Where exception is taken to a particular instruction which is within the

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McKay vs. Friebele.—Statement of Case.

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limits of, and relevant to the issue joined, the evidence upon which the instruction is based must be fully and properly presented in the record.

5. The only mode of bringing up to this Court the evidence used below in a common law suit, is by incorporating it into a "bill of exceptions," duly attested by the signature of the judge, or of three bystanders, as is prescribed by the statute.

This case was decided at Tampa.

Friebele brought his action of assumpsit against McKay in Hillsborough Circuit Court, stating the damages in the *praecipe* at \$249 50.

The declaration is as follows:

For that whereas, heretofore, to wit: on the seventh day of April, one thousand eight hundred and fifty-one, the said James McKay made, and entered into a certain instrument of assignment, which is as follows:

This instrument of assignment made the seventh day of April, A. D. 1851, by Joseph W. Fitch and Harrison R. Blanchard of the first part, assigns, and James McKay assignee, witnesseth. Whereas, the said Joseph W. Fitch and Harrison R. Blanchard have each an undivided right and interest in, and to a certain quantity or number of pieces of Red Cedar timber now afloat in Raft in the Hillsborough River, in number about thirteen hundred pieces, measuring by estimation about twelve thousand cubic feet, and which said timber, the said Fitch and Blanchard are desirous of having shipped from the Port of Tampa Bay to the city New York, unto Joseph Brice, commission merchant, for disposition and sale; and whereas, the said Joseph W. Fitch and Harrison R. Blanchard are indebted to the said James McKay for supplies of forage, provisions, goods, &c., to the amount of five hundred and two dollars had and received, and also indebted unto C. L. Friebele in the sum of one hundred and twenty four dollars and seventy-five cents, and unto Samuel Knight in the sum of eigh-

ty nine dollars and ten cts., for supplies had and received, and unto Edward Caruthers eighty-nine dollars for labor to March 22, 1851, to Thomas Caruthers ninety dollars and four cts., to Toney Tucker six dollars and sixteen cts., to Thomas Tucker twenty eight dollars and seventy five cents, Stephen Hall forty-one fifty-nine one hundredths dollars, Henry Langford thirty two dollars and sixty-eight cts., James Condrey eighty-four dollars and six cts., Thomas Tracy sixty-two dollars and fifty-one cts., James Ryalls fourteen dollars and ninety two cts., John Sylvester twenty dollars and eighty-eight cts., William Sylvester twenty-three dollars and sixty-five cts.,——Buffrum four dollars and fifty cts., Wm. T. Rushing twenty four dollars and ninety eight cents, Joseph Wells ten dollars, Samuel Caruthers eleven dollars and twenty-five cts., and Harrison R. Blanchard for money, provisions, forage, tents, &c., expended for, and on account of said cedar lumber thirteen hundred sixty-four dollars and sixty-seven cents, to Anthony Raza for the services of three negroes, Richard, Daniel and Demon, to May the 1st, 1851, one hundred and seventeen dollars, to J. W. Brit for the services of a negro slave Sam, to April 15th, 1851, fifty dollars.

Now, therefore, in consideration of the sum of five hundred ten dollars nine cts., as above stated, had and received by the said Joseph W. Fitch, and the said Harrison R. Blanchard, from the said James McKay, and in further consideration, that the said James McKay will advance and pay to the said C. L. Friebele, Samuel Knight, Edward Caruthers, Thomas Caruthers, Toney Tucky, Thomas Tucker, Stephen Hall, Henry Langford, James Condrey, Thos. Tracy, James Ryalls, John Sylvester, William Sylvester, —— Buffrum, James E. Ellis, William R. Rushing, Joseph Wells, Samuel Caruthers, Antonia Raza and S. W.

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McKay vs. Friebele.—Statement of Case.

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Brit, their respective sums due as above stated, being the total sum of one hundred and twenty-three dollars and twelve cts., upon receipt of said Timber, while at Tampa, and shipping the same, that he will cause the same to be shipped to New York for sale and disposition by Joseph Brice, and that after deducting and reimbursing himself, the amount of five hundred and ten dollars and nine cents above stated, and also, with commission of five per cent. on gross amount advanced, disbursed and paid out, that the said James McKay will cause to be deposited or pay into the hands of said Joseph Brice for the use, and subject to the order of said Harrison R. Blanchard, (should sufficient remain,) the said amount above stated, thirteen hundred and sixty six dollars and fifty-four cents, and also an equal part of the residue which may remain from the net proceeds of the sales of the said timber, and also, that he will pay, or cause to be paid to the order of Joseph W. Fitch the remaining half part of the net proceeds of the sales of the said timber as aforesaid.

They, the said Joseph W. Fitch and the said Harrison R. Blanchard, do hereby assign, transfer and relinquish unto the said James McKay, all their right, title and interest in, and to all and every piece, part and parcel of the said timber in trust for the purpose and objects above stated, and they, the said Joseph W. Fitch and Harrison R. Blanchard, do hereby agree and covenant with the said James McKay, that they warrant and defend the said timber, against the claims of every other person or persons claiming the same, by or through or under them.

In witness whereof, they have hereunto set their hands

and seals. Done at Fort Brook, Tampa Bay, this seventh day of April, A. D. 1851.

Signed, JOSEPH W. FITCH, [Seal.]  
HARRISON R. BLANCHARD, [Seal.]

Signed, ARC. CAMPBELL,  
JAS. M. RYALLS.

I, James McKay, do hereby accept of the above assignment from the said Joseph W. Fitch and the said Harrison R. Blanchard, for the purposes, and upon the conditions therein expressed.

Witness my hand, at Fort Brook, Tampa Bay, this the seventh day of April, A. D. 1851.

Signed, JAMES MCKAY.

In which said agreement or instrument of assignment, the said Jas. McKay, assignee, promised to pay the plaintiff the sum of one hundred and twenty-four dollars and seventy-five cents upon the receipt of said Cedar Timber, and the plaintiff avers that afterwards to-wit: on &c. &c. and before the commencement of this suit, the defendant did receive the said Cedar Timber, by means whereof, and by virtue of the said instrument of assignment so entered into and accepted by the defendant, he the said James McKay then and there became liable to advance and pay to the plaintiff the sum of money in said assignment specified, according to its tenor and effect, and being so indebted and liable as aforesaid, he the said James McKay, in consideration of the premises, afterwards to wit: on the day and year aforesaid, undertook, and then and there faithfully promised the plaintiff to pay him the said sum of money, in said agreement specified, according to its tenor and effect.

And whereas, afterwards to-wit: on the day and year aforesaid, the said defendant was indebted to the plaintiff

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**McKay vs. Friebele.—Statement of Case.**

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for money advanced by the plaintiff, for his, defendant's use, and at his special instance and request to the amount of one hundred and twenty-four dollars and seventy-five cents; and in the further sum of one hundred and twenty-four dollars and seventy-five cents, on an account then and there stated between then; and being so indebted, he, the said defendant, afterwards, to-wit: on the day and year aforesaid, and in consideration of the premises, undertook, and then and there faithfully promised the plaintiff to pay him the said sums of money, whenever he should be thereunto afterwards requested so to do; nevertheless the said defendant, not regarding his said several promises and undertakings, has not as yet paid said sums of money, or any or either of them, or any part thereof, although requested so to do, but to pay the same, has hitherto wholly neglected and refused, and still does neglect and refuse to the damage of the plaintiff two hundred and fifty dollars, whereupon he brings suit, &c.

McKay, the defendant, demurred to the declaration as follows:

And the said defendant, by James T. Magbee, his attorney says that the said plaintiff's declaration is insufficient in law, because he says:

1st. Assumpsit cannot be sustained upon the instrument set out in the plaintiff's declaration.

2d. Plaintiff cannot bring suit in his own name upon the instrument set out in his declaration.

3d. The promises set out in plaintiff's declaration, if any was made, was not made to plaintiff as alleged in his declaration and the breach thereof.

4th. The breach is in debt and the action in assumpsit.

5th. There is no promise made by James McKay to pay plaintiff.

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6th. There is a variance between the præcipe and the declaration, in the amount of damages.

7th. The assignment is under seal and the acceptance is not under seal.

8th. If the assignment be under seal, the acceptance of the assignment must be under seal to bind the defendant.

9th. In such an instrument set out in the plaintiff's declaration, the action, should be brought in the name of Joseph W. Fitch and Harrison R. Blanchard for the use of plaintiff.

- The court below overruled the demurrer, and defendant by his counsel excepted.

Defendant having pleaded over, a jury was sworn, who returned a verdict for the plaintiff.

At the trial, defendant's counsel asked the court to instruct the jury:

1st. That unless it is proven that James McKay accepted the first deed of assignment, they must find for McKay.

2d. That a verbal promise to W. H. McDonald by James McKay that he would pay C. L. Friebele a debt which Fitch and Blanchard owed to him, Friebele, is not binding on McKay.

3d. That unless it has been proven that James McKay accepted the assignment on which this suit is brought in writing, then they must find for the defendant.

The court granted the first and refuse the second and third instructions asked for.

The instructions asked for were attested by the signature of the judge below.

The bill of exceptions only embrace the testimony of a witness examined at the trial.

*Magbee, Gettis and Mitchell* for plaintiff in error.

*O. B. Hart* for defendant in error.

DUPONT, J. delivered the opinion of the Court.

This was an action of assumpsit, and is brought up to this court by writ of error from the Circuit Court of Hillsborough county. The declaration contains three counts. The first is a special count, setting out at large the instrument of writing out of which the cause of action is alleged to have arisen. The others are for money advanced and an account stated. There was a demurrer to the whole declaration, but the grounds of demurrer assigned point mainly to the first count. Judgment was given for the plaintiff upon the demurrer, and this ruling is assigned by the appellant, who was the defendant in the Court below, as the first ground of error.

In the view which we have taken of this assignment of error, it becomes necessary to consider the various grounds of exception taken to the special count. If it shall be found that either one of the common counts was sufficient then the demurrer, being to the whole declaration, the court was bound to give judgment thereon for the plaintiff. This is a well established principle, upon which there is no controversy in the books, and it has been repeatedly so ruled by, this court. 1 Chitty on Pleading, 664; Archbold on Civil Pleading, 309; 1 Saunders, 286; 1 Wilson R., 248; Barbee vs. The J. & A. Plank Road Co., 6 Fla. R., 262.

Amongst the numerous exceptions specially set forth as grounds of demurrer, there are only three which are applicable to the two common counts of the declaration. These are the 4th, 5th and 6th. The fourth and fifth exceptions are respectively set forth thus: "The breach is in debt, and the action in assumpsit. There is no promise made by James McKay to pay the plaintiff." We have

looked into the declaration with reference to those two objections, and, after a careful examination, are constrained to say, that in these respects the declaration is entirely faultless. The breach and promise, as set forth in the declaration, are full and positive, and conform most critically to the precedents in *assumpsit*, as prescribed by Mr. Chitty. The remaining exception applicable to the common counts, and indeed to the whole declaration, is that there is a variance between the *præcipe* and declaration in the amount of damages. The damages stated in the *præcipe* is \$249 50, and that in the declaration is \$250. We do not think that this objection is such as would lay the foundation for a writ of error. It is laid down in the books, that a writ of error lies, where a person is aggrieved by an error in the foundation, proceedings, judgment or execution of a suit, provided it be an error in substance, not aided at common law, or by some of the statutes of *jeofail*. (1 Arch. Prac., 208.) That the objection might have been obviated in the Court below by a motion so to amend the declaration as to make the damages conform to the damages stated in the *præcipe*, there can be no doubt; and this Court has already ruled, in the case of "*Campbell vs. Chaffee*," (6 Fla. Reports, 724,) that where an amendment in matter of form is allowable, the Court will give the party entitled to the amendment the full benefit of it, as though it had been actually made. We conclude, then that the common counts were unobjectionable, and, that being the case, the judgment overruling the demurrer was correct.

The next and last error assigned is in these words, viz: "The court erred in not giving the second and third instructions asked for by the appellant to the jury." The instructions referred to are as follows: 2d. That a verbal promise to Wm. H. McDonald by James McKay, that he

would pay to C. L. Fribele a debt which Fitch & Blanchard owed to him, Friebele, is not binding on McKay.” “3d. That unless it has been proven that James McKay accepted the assignment on which this suit is brought in writing, then they must find for the defendant.”

In order to determine the correctness and appropriateness of an instruction which may be given to the jury, resort must always be had to the evidence upon which the instruction is based. That evidence, whether parol or documentary, is to be found only in the “bill of exceptions,” whose peculiar office it is to give the incidents occurring in the progress of the trial, from the joining of the issue to the rendition of the verdict. It may be laid down as a general rule, subject to but one exception, that wherever the error complained of is predicated upon the instructions of the Court below, the whole evidence, or, at least, so much thereof as forms the basis of the instruction, must appear in the “bill of exceptions” accompanying the record of the cause.

The exception alluded to is where the instruction is manifestly without the limits of the issue joined between the parties, and is likely to mislead the jury in making up their verdict. In such case, no reference to the evidence can be of any avail in determining the correctness of the instructions, and the court may pronounce upon it even in the absence of the bill of exceptions, provided it be properly attested by the signature of the Judge below.

The bill of exceptions attached to the record in this cause is manifestly incomplete. It purports to give only the testimony of a witness who was orally examined at the trial, and leaves out the documentary evidence, which is specially referred to in the body of the instructions asked for by the defendant and refused by the Court. In this state of case, it would be highly improper for this

Court to undertake to determine that the judge below had erred, for such conclusion could only amount to a conjecture. The correct rule upon this subject is, that nothing will be left to conjecture; and if the bill be so loosely drawn as to leave the matter in doubt, the proceeding below will be sustained, notwithstanding there may be some reason to suspect that error might have been intervened. Accordingly it is held, that if the evidence on which the instructions to the jury were intended to bear, be not presented by the bill, the court will not adjudge such instructions erroneous. The nature, office and indispensability of the bill of exception, in a common law suit, has been so frequently discussed by this court, that any further effort to impress its importance upon the bar would seem to be a work of supererrogation. We will only further commend to the attention of the profession the views of this court heretofore expressed in the cases of *Dorman vs. The ex'ors of Francis Richard*, (1 Fla. Reports, 297,) and *Poctor vs. Hart*, (5 Fla. R., 465.)

Let the judgment be affirmed with costs.

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JAMES MCKAY, APPELLANT, VS. HENRY C. BELLOWES, APPELLEE.

1. Where there is no bill of exceptions accompanying the record, but the instruction complained of purports to have been in writing, duly attested by the judge who presided at the trial; and it is manifestly irrelevant to the issue joined between the parties, this Court will consider and pronounce upon such instruction.

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**McKay vs. Bellows.—Opinion of Court.**

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2. Where a promissory note had been given for the purchase of a horse, which note was afterwards transferred to a third party, who brought suit thereon against the maker, and the pleas were "failure," "partial failure" and "want of consideration," it is error in the judge below to instruct the jury, "that to sustain the defendant's plea of *fraud*, it must be proved to them that there was fraud by the payee of the note, in the sale of the horse to the maker, and that there was fraud between the assignee and the payee of the note, in the purchase of the note; and that it must be proved and that the assignee was notified of the fraud between the payee and the maker in the sale of the horse before he purchased the note."

This case was decided at Tampa.

The facts of the case are set out in the opinion of the Court.

*James T. Magbee* for the appellant.

*James Gettis* for appellee.

DUPONT, J., delivered the opinion of the Court.

This was an action of *assumpsit* brought in the Circuit Court of Hillsborough County, by the endorsee of a promissory note against the maker. Three special pleas were interposed by the defendant, in each of which he attempted to set up the defence of a failure of consideration. To each of these pleas there was a demurrer, which was sustained, and the defendant was allowed to plead over. He then plead 1st, a failure of consideration. 2d, a partial failure of consideration, and 3d a want of consideration, upon which issue was severally joined and the parties went to the jury. The court instructed the jury as follows: "That to sustain the defendant's plea of *fraud*, it must be proved to them that there was fraud by McCarty in the sale of the horse to McKay, and that there was fraud between Bellows and McCarty in the purchase of the note, and it must be proved that Bellows was notified of the fraud between McCarty and McKay in the sale of the horse

before he purchased the note." Under this instruction the jury found a verdict for the plaintiff and judgment was entered accordingly. It is from that judgment that the appeal is taken, and the error is predicated upon this instruction of the judge below.

There is no bill of exception accompanying the record, and the evidence upon which the jury founded their verdict is consequently not before us. There is in the record, however, a paper containing the instruction complained of, which purports to have been in writing and signed by the judge. Ordinarily, in the absence of the Bill of Exceptions, we should be constrained to refuse to consider the error assigned, but the circumstances of this case bring it precisely within the exception laid down in the opinion delivered in the case of McKay vs. Friebele, decided at the present term of this court, viz: "where the instruction is manifestly without the limits of the issue joined between the parties, and is likely to mislead the jury in making up their verdict."

The issues in the case were upon the pleas of a "failure," "partial failure," and "want of consideration." Either one or all of these pleas might be sustained without the allegation or proof of fraud. Even misrepresentation, whether fraudulent or innocent, is not essential to support the defence under these pleas. The defence might be sustained, although the utmost good faith had been observed by the plaintiff. If this be so, then it was manifestly wrong to instruct the jury, that fraud must be proved, in order to sustain the defendant's defence. It is not every erroneous instruction, however, that will induce this court to interfere with the judgment of the court below. The instruction must be such as is obviously calculated to mislead the jury. We think the instruction complained of in

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Stafford vs. Anders.—Statement of Case.

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this cause is of that character, and we therefore feel constrained to sustain this assignment of error

Let the judgment be reversed and a new trial be granted in the Court below.

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JOSHUA STAFFORD, APPELLANT, *v/s.* GEORGE W. ANDERS.  
APPELLEE.

1. Formal defences are dispensed with by rule of Court, such as "*defends against the wrong and injury, actionem non,*" and their use, even if improper, does not invalidate a plea.
2. A partial failure of consideration is made matter of defence by statute.
3. A sale of personal property, as of hogs, is not complete without delivery, identification or discrimination, and it is the duty of the vendor to make this, unless otherwise agreed.
4. A plea setting up a sale of 58 head of hogs, with a delivery of 26 and refusal to deliver the remainder, was held a valid defence as to those not delivered, and, if there was fraud in procuring the note, no recovery could be had upon it.
5. A sale of State land by a trespasser confers no right, no title, and is no consideration for a note given for it. Whether a pre-emptioner may sell was not decided by the Court.

This case was decided at Tampa.

Anders brought his action of assumpsit against Stafford upon two promissory notes, one for two hundred and nineteen dollars, and the other for one hundred and fifty dollars.

To the first count of the declaration the defendant pleaded specially, "that the consideration for which the

note mentioned in that court was made has in part failed in this, that a part of the consideration of said note was for a certain lot or stock of hogs, to-wit: fifty-eight in number, at the price of two dollars per head, making the sum of one hundred and sixteen dollars; and the said plaintiff then and there delivered to the defendant seventeen of said hogs; that the plaintiff represented to defendant that the remaining forty-one head were at Live Oak Pond and other places in Hernando county, and were gentle and manageable, and would come to defendant's call; that defendant did go to the places designated and called the hogs and hunted the range in and about the places aforesaid, and found only eight head, which were so wild and unmanageable that the defendant had to run them down with dogs and shoot a part, and that defendant hunted diligently for the remaining thirty-three head and has been unable to find them."

To the second count defendant pleaded specially a failure of consideration.

To the first plea the plaintiff demurred, alleging as causes of demurrer:

1st. That the said plea sets up no sufficient avoidance of the cause of action in the first count of plaintiff's declaration mentioned.

2d. It is not alleged in said plea that the note sued on was obtained by fraud.

3d. It is not alleged in said plea when the defendant went to the ponds, in the plea mentioned, to look after the hogs, nor when he hunted diligently for them.

4th. The plea in part impeaches the consideration on which the note was given, and is not sworn to, nor was it filed at the appearance term of the cause.

To the second plea plaintiff also demurred, alleging as cause of demurrer, among others, that it sets up no suf-

ficent legal avoidance of the cause of action set out in the second count.

The Court sustained the first ground of demurrer to the first and second pleas and overruled all others.

Defendant then, by leave filed three amended pleas to the first count and one to the second count of declaration.

The first amended plea alleges, that "the consideration for which said promissory note in the first count mentioned was given, has partially failed in this, that said note was partly given for fifty-eight head of hogs, at two dollars per head, which plaintiff agreed and promised afterwards to deliver to defendant, and defendant says that the said plaintiff did not deliver to the defendant the said fifty-eight head of hogs, but only delivered twenty-five head, and that plaintiff has refused to deliver the remaining thirty-three head," &c.

The second amended plea alleges "that the plaintiff was indebted to defendant in the sum of sixty-six dollars, it being the value of thirty-three head of hogs which the plaintiff before that time promised to deliver to defendant, and the defendant offers to set off the said sixty-six dollars against as much of the said demand in the first count mentioned," &c.

The third amended plea alleges that "the plaintiff obtained said note by fraud and misrepresentation in this that he, the said plaintiff, represented to defendant that he would deliver fifty-eight head of hogs, provided defendant would give him the said promissory note mentioned in the first count of plaintiff's declaration, and defendant says that the plaintiff has fraudlently refused and does refuse to deliver part of said hogs, to-wit: thirty-three in number," &c.

The amended plea to the second count alleges, "that the promissory note mentioned in the second count of

plaintiff's declaration was obtained by the plaintiff from defendant by fraud and misrepresentation in this, that plaintiff was trespassing upon State land, and induced the defendant to give him said promissory note for the use and occupation thereof when defendant did not know that said land belonged to the State," &c.

The plaintiff demurred to the amended pleas, and alleged as causes of demurrer to the first amended plea :

1st. The plea defends against the whole count, and sets up only a partial failure of consideration.

2d. The plea sets up an agreement and promise of plaintiff to deliver the hogs therein mentioned to defendant after the note sued on was given, and such promise is *nudum pactum*.

3d. The plea in substance is such a plea as the first plea demurred to.

4th. The plea is, in many respects, insufficient.

To the second amended plea :

1st. The defendant offers in said plea to set off against plaintiff's demand the odds of the same thirty-three head of hogs which in his first plea are set up as the cause of a partial failure of consideration, and it is pleading in the matter of said hogs double.

To the third amended plea :

1st. The said plea is not a good, sufficient or legal plea of fraud against the said plaintiff's cause of action.

2d. The plea does not extend to the whole note declared on, and is therefore bad.

To the amended plea to the second count :

1st. It is in effect the same as defendant's original second plea, or plea to the second count in plaintiff's declaration, which has been demurred out.

2d. It is the plea of a tenant seeking to deny the title of his landlord.

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*Stafford vs. Anders.—Statement of Case.*

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3d. It does not set up any fraud practiced by plaintiff on defendant to induce defendant to execute the note sued on and pleaded to.

4th. It is not alleged that the note sued on was obtained by fraud and misrepresentation.

The Court sustained the demurrer to the amended pleas, except the first ground to the first plea, and allowed the plaintiff to amend his declaration and defendant to plead over within sixty days.

The defendant having failed to plead over, judgment by default was entered, and defendant appealed.

*Jamee T. Magbee* for Appellant.

*James Gettis* for Appellee.

BALTZELL, C. J., delivered the opinion of the Court.

The plaintiff in the court below, George W. Anders, sued to recover upon two promissory notes, the one for \$219, the other for \$150, and obtained judgment upon them, the defendant Stafford has appealed to this court, alleging error in the decision overruling his defences. To the first note he plead that "it was executed in part for a lot of stock hogs, to-wit: fifty-eight in number, at the price of two dollars per head, making the sum of \$116—that the plaintiff delivered him 17 of said hogs, and represented that the remaining forty one were at different places in Hernando county—were gentle, manageable and would come to the call of defendant—that defendant did go to the places designated and called them and hunted the range thereabouts and found only eight head, which were wild and unmanageable, and that he hunted diligently for the remaining thirty-three head and has been unable to find them." The plea was demurred to as "setting up no sufficient defence, as not alleging that the note was obtained by fraud

as not setting forth *when* defendant went to the ponds nor when he hunted diligently—that it impeaches in part the consideration on which the note was given, and was not filed at the appearance term, nor sworn to.” The court sustained the first ground of objection and overruled the defence. Defendant then filed three amended pleas which were all demurred to. The first of them alleged that “the consideration of the note had partially failed in this—that it was given for fifty-eight head of hogs at two dollars per head, which plaintiff agreed and promised *afterwards* to deliver to the defendant, and that plaintiff delivered only twenty-five and refused to deliver the remaining thirty-three head.” The objection to this plea on the part of plaintiff was, that “the plea defends against the whole count and sets up only a partial failure of consideration—that it sets up an agreement of plaintiff to deliver the hogs after the note sued on was given, and such promise is *nudum pactum*, that it is in substance the same as the first plea demurred out, and is otherwise insufficient.” The court sustained these objections except the first.

The exceptions to the plea are rather to its form, than to the merits contained in it. By our statute, a partial failure of consideration may be pleaded with the like efficiency as one that is total. It will prevail to the extent of such defence—see pamphlet laws of 1850; page 125. Of the same character is the objection, that “the plea defends against the whole count,” by which it meant, that the plea commences by saying “the defendant comes and defends the wrong and injury, when, &c.” Whatever force may have been attributed to these expressions by the early common law, in practice none has been allowed them here, and the rules of Court expressly declare that “no formal defence shall be required in a plea,” and it shall commence as follows: “the said defendant by his attorney says, &c.” and

further that "it shall not be necessary to use any allegation of *actionem non*, or to the like effect, &c." Certainly then the improper use of terms declared to be unnecessary cannot be considered to have the effect of invalidating a plea, if it be in other respects unobjectionable.

Passing from these, the question remains, is the plea good in substance.

Admitting that the agreement for the delivery of the hogs was made *afterwards*, and not at the time of the bargain, and that there was no agreement then as to the delivery; the enquiry arises as to the effect of the agreement set up in the pleas, divested of all provision as to the delivery.

Thus stated, the allegation of the plea is that "the note was given for 58 head of hogs at two dollars per head."

Such an agreement constitutes a sale, and will be found to be attended with the following results in contemplation of law:

"The simplest form of a sale is when the price is paid and the article is immediately delivered. But inasmuch as there can be a sale of a thing in future, and also, since the thing sold may not be in the actual possession of the seller, subsequent acts by one or both parties often become necessary in order to complete the sale."—Story on Cont. 304.

"Delivery completes the contract of sale, and vests the title to the property sold in the vendee, so that if they be destroyed afterwards by casualty he must bear the loss." —§ 503.

The first rule of law applicable to delivery, and to which *all other rules are subordinate*, is that no sale is complete so as to vest an immediate right of property in the buyer, so long as any thing remains to be done as between the buyer and seller. The goods sold must be *identified*,

*separated and distinguished* from all other goods, or from the bulk or mass with which they are mixed. When goods are sold by number, weight and measure, so long as the specific quantity or measure is not separated and identified, the sale is not completed, and the goods are at the risk of the seller." Story on Contracts and cases cited. Sec. 504.

Where the seller has done everything that is required of him as to a portion of the goods, yet something still remains to be done before delivery in regard to the rest of the goods, the goods which have been separated and designated, and are ready for delivery, became the property of the buyer and are at his own risk, but the part in which something remains to be done is at the risk of the seller, and as to them the sale is incomplete, nor does it make any difference in such case whether the contract be entire or severable. Thus where a quantity of starch in packages was bought, and it was agreed that the different packages should be weighed by the seller, who accordingly weighed a portion of the starch and delivered it to the vendee, and left a portion unweighed, and the vendee in the meantime became bankrupt, it was held that the weighing and delivery of a part of the starch, did not transfer to the vendee the property in that which was unweighed. When the whole duty of the seller is completed, and nothing remains to be done by him in relation to any part of the goods, a delivery of a part will be considered as constructive delivery of the whole, whenever the contract of sale is entire. And the same rule governs although the contract be severable, unless intention on the part of the seller to surrender only a part is either expressed or manifestly implied from the circumstances." Sec. 505.

"For a sale to be valid in law, there must be parties, a

consideration, and a thing to be sold.”—Parsons on Contracts, 437.—“The thing sold must be specific and capable of *certain identification*.”—Page 440.

“The property does not pass absolutely, unless the sale be completed, and it is not completed until the happening of any event provided for, or so long as anything remains to be done to the thing sold, to put it in a condition for sale or to identify it, or discriminate it from other things, &c., unless this is to be done by the buyer alone.” *Ibid*, 441.

It is unnecessary to say, that by the plea no obligation of this kind rests with the buyer. We hold then, that under the facts set up by this plea, delivery was an essential part of the contract, and was incumbent on the vendor. Until this was had, the things sold were not specific, not capable of *certain identification*. Were it otherwise, we should be compelled to hold, that such sale gave the right to take fifty eight hogs of any description of the plaintiff's at the pleasure of the purchaser, any where and at any time. Not only does this plea set up a right to this, of this number of hogs from plaintiff, but a *refusal* on his part to deliver more than one half of those agreed to be delivered. Under such a state of facts, can it be possible, that a question or doubt can exist as to the impropriety of his demanding pay for more than the number delivered? We certainly feel none.

The Court then should have overruled the demurrer to this plea and not sustained it.

The second amended plea was not relied upon in argument, and is obviously not good, and the Court below was right in overruling it. The third alleges, that “the plaintiff obtained said note by fraud and misrepresentation in this, he the said plaintiff represented to this defendant, that he would deliver fifty eight head of hogs, *provided* said defendant would give him the said promissory note and

the said defendant says that the plaintiff has fraudulently refused to deliver part of said hogs, to-wit: thirty three of them," &c. This also was demurred to, overruled and declared insufficient. With an admission of two such prominent facts by the demurrer, that of a condition attached to the bargain and refusal to observe it or comply with it, and fraud in the agreement, we cannot perceive the grounds for sustaining the demurrer.

"If the consideration of a contract be fraudulent, or at all tainted with fraud, it cannot support a promise; and not only fraudulent declarations or misrepresentations, but any other species of fraud will avoid a contract, and the fraud may be pleaded in bar of any action upon it."—Arch. N. P. 160.

It may be that the facts attending the refusal to deliver the remaining hogs should be more fully set forth, so as to show fraud, as that plaintiff sold and delivered to some other person, or destroyed them, or drove them off so that defendant could not get them; yet without the fraud, with some indulgence to the pleading, for all the pleas seem to be indifferently drawn, we are not satisfied that the demurrer should have been sustained. It is well settled that "a subsequent failure of the consideration for which a bill or note has been given, either in the whole or in part when of definite amount, such as the non-performance of a condition precedent, will afford a defence entirely or partially, and if a bill or check has been given, even on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop payment and may defend an action thereupon." 1 Chitty on Bills, 76; 3 Campbell, 376 and notes. This is stated with a qualification, that "the matter which the holder has failed to perform must constitute the principal condition precedent upon which the bill was given, or it will afford no defence."—*Ibid.*

No doubt if fraud can be established in procuring the note, no recovery can or should be had upon it; and rejecting the fraud, or none being found to exist, a recovery should not be had under the facts set up by the plea beyond the number of hogs delivered.

The judgment on the demurrer to this plea should then have been for defendant, and not for plaintiff.

Another amended plea yet remains to be considered to this effect, that "the promissory note in the second count of the plaintiff's declaration was obtained by plaintiff from defendant by fraud and misrepresentation in this: Plaintiff was trespassing upon State land and induced this defendant to give him said promissory note for use and occupation thereof, when this defendant did not know that said land belonging to the State." This was demurred to on the ground that "a like plea had been demurred out; that it seeks to deny the title of his landlord; does not set up any fraud practiced by plaintiff on defendant to induce him to execute the note," &c. It is very clear, we think, that the plea is deficient in averments adequate to constitute a bar. It is not specific—too large and indefinite—yet we do not think it objectionable for the reasons stated in the demurrer.

The general rule is undeniable, we had almost said inflexible, that the tenant shall not deny the title of his landlord. It is founded in great wisdom, and should not lightly be impaired or infringed. It is not, however, universal in its application, nor without exception. Perhaps it may be said that the exception more firmly establishes the rule.

"If a tenant obtains possession from one who falsely represents himself to be landlord, he can show that the plaintiff was not landlord, nor the real owner at the time of the agreement."—*Glenn vs. Rise*, 6 Watts, 44.

“Again, a tenant cannot impeach his landlord’s title, unless he or the commonwealth has been defrauded by the landlord.”—5 Watts, 55; 4 S. & R., 382.

We quote from U. S. Digest, and regret very much not to have had more direct access to the authorities cited. The doctrine is so appropriate and founded in such reason and good sense as to commend itself to adoption, whilst its application to the present case would seem to be very clear. By the law of the State, it is made “the duty of the judges of the Circuit Courts to charge the Grand Jurors of their respective counties to present all and every person who shall hereafter *trespass* upon the public lands of the State to the damage or injury of the same, whether the same are for the support of schools, seminaries or internal improvements, and the person convicted shall pay the costs and a fine equal to four times the amount of damage sustained by the State on account of said trespass.”—See Laws 1848, p. 36. A trespasser is very obviously a man occupying the public land without right. To give sanction and validity to such sale would but invite the trespasses prohibited, so that the most strange and forbidding anomaly would exist of one department of the government prohibiting, by severe and positive penalties, a particular act, whilst another would be giving it encouragement. It may be said, that the nature of the trespass is not stated in the law. It is not difficult to see that the intrusion upon, and occupying of the land, holding it as owner, and treating it as such, are of themselves a trespass in like manner as if the land belonged to a private individual. Whilst declaring this, it is proper to state that the case of persons holding under, or entitled under pre-emption laws, is not embraced in the remark. The plea yet is so indefinite and wanting in precision and appropriate averments to bring

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Harrell vs. Harrell et al.—Statement of Case.

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it within the law, that on this account it must be overruled. The judgment on the demurrer was therefore right.

The judgment of the Circuit Court will be reversed, set aside, and the cause remanded with directions to the court to give judgment on demurrer for defendant on the first and third amended pleas, and for plaintiff on the second and fourth pleas, and to award a repleader for further proceedings to be had therein, not to be inconsistent with this opinion.

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MARTHA A. HARRELL, APPELLANT, *vs.* MARGARET HARRELL, JAMES HARRELL AND OTHERS, APPELLEES.

1. Where a widow elects, under the provisions of the act of 1838, to take a "child's part" in the estate of her deceased husband, if there be no child, she takes one half of the real estate in fee simple and a like quantity of interest in the personality, including slaves, absolutely.
2. It is a rule, in construing statutes, that the original act and the amendment is to be viewed as one act, and that no portion of either is to be declared inoperative, if they can be made to stand together without wresting the words from their appropriate meaning.

This case was decided at Marianna.

The appellant filed her bill in the Circuit Court of Washington county against the appellees, alleging that her husband, William A. Harrell, died in Washington county, in this State, on the 27th day of February, 1856, and that letters of administration on his estate were granted to complainant; that at the time of the death of said William Harrell, he was the owner of certain real and personal estate described in the bill; that said William

A. Harrell left no children and no father, and that, aside from complainant, his widow, his nearest of kin are his mother and brothers and a sister, who are the defendants to the suit. The bill further alleges, that the complainant is entitled, under the laws of this State, to dower in the estate of said William A. Harrell, or to a child's part in said estate, and having elected to take a child's part, and there being no child, she claims to stand in the place of a child and to be entitled to the whole estate. The bill also alleges, that if complainant does not take the whole estate, she is entitled to one-half, and that the defendants, as next of kin, take the other, and concludes with a prayer for a decree assigning to complainant the whole of the property as her "child's part" of the estate of said William A. Harrell, and that if she is not, by her election, to take a child's part, entitled to the whole, then that she be decreed to be entitled to one half thereof.

The defendants demurred to the bill of complaint, alleging specially that complainant is only entitled to her dower in the lands and to one-half of the personal estate left by the said William A. Harrell, dec'd, the lands and slaves belonging to her only for and during her natural life, and to no other or greater interest, share or portion of said estate.

The Court sustained the demurrer and dismissed the bill with costs.

*Yonge & McClellan* for appellant.

*A. H. Bush* for appellees.

DuPONT, J., delivered the opinion of the Court.

The first section of the act of 1828, in relation to dower, (Thomp. Dig., 184,) provides, that "when any person shall die intestate, or shall make his last will and testament,

and not therein make any express provision for his wife, by giving and devising unto her such part or parcel of real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto in the Circuit or Probate Courts of the county wherein she resides (and if there be no Court in the county, then to either of the said Courts in the next adjoining county) at any time within one year after the probate of such will, and then and in that case she shall be entitled to dower in the following manner, to wit: one-third part of the lands, tenements and hereditaments of which her husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower, as heretofore provided for by law, which third part shall be and inure to her proper use and behoof in and during the term of her natural life," &c., &c.

The second section provides, that "when a husband shall die intestate, or shall make his last will and testament, and not make provision therein for his wife, as expressed in the first section of this act, she shall be entitled to a share in the personal estate in the following manner, to wit: If there be no children, or, if there be but one child, in that case she shall be entitled to one-third part in fee simple, except slaves, in which she shall have a life estate, and such claim shall have preference over all others."

The act of 1838, which is amendatory to this act, (Thomp. Dig., 185,) provides as follows: "In all cases in which the widow of a deceased person may be entitled to dower under the statute to which this is an amendment, she shall make her election either of dower or of a child's part within twelve months after the probate of the will or granting letters of administration, or she shall be confined to her dower."

“If a widow take dower, she shall be entitled only to a life estate in the real property, to return at her death to the estate of her deceased husband for distribution. If she takes a child’s part, she shall have in the property set apart to her, a fee simple estate in the real property and an absolute title to the personal property, including slaves, with power to control or dispose of the same, by will, deed or otherwise.”

In the case before us, the widow took administration on the estate of her deceased husband, and she has elected to take a child’s part in the same. The bill was brought by her against the next of kin of her husband, being the mother, brothers and sisters, and asked that it might be declared by the Court what was the quality and extent of her interest under that election. It also alleged that she is and was childless at the time of the decease of her husband, and that the estate consists of lands, slaves and some other personal property. Under this state of facts, she insists that she is entitled to the entire estate after the payment of debts, there being no child to divide the estate with her, and, if not to the whole, then to one full moiety of the same.

For the next of kin it is insisted that the widow must be confined to her dower, and that her’s is not a case of election within the provision of the amendatory act of 1838, there being no child or children by which her claim of a *child’s part* can be admeasured. This contest involves a construction of the act of 1838, and raises two questions: 1st. Whether the widow was entitled to make her election between dower and a child’s part in a case where there is no child living at the death of the husband? and, secondly, if she be entitled to her election, what is to

be the quantity and extent of her interest in the estate under such election?

Upon a cursory examination of the provisions contained in the act of 1838, there does seem to be some difficulty in applying them to the facts of this case; but, when it is remembered that it is an enabling act, being expressly amendatory of the act of 1828, the difficulty vanishes under the well established rule that the original statute and the amendment are to be viewed as one act, and that no portion of either is to be declared inoperative if they can be made to stand together without wresting the words from their appropriate meaning. The act of 1828 provides expressly for the case where there is no child, giving in that event a certain portion of the estate to the widow. The enactment of 1838 was evidently intended for the benefit of the widow, by giving to her a higher estate than she would get, under the provision for dower, contained in the old act, should she elect under the circumstances to take it. Three conditions of the estate were provided for under the old act, to wit: Where there should be no child—where there should be one child, and where there should be more than one child. To hold that the amendatory act, which is general in its character, embraces only the two latter conditions, and is not to be applied to the first, we think would be giving a construction to the act not warranted by any recognized rule of interpretation. The operation of the statute is as broad and comprehensive as language can make it. The words are: "*In all cases in which the widow of a deceased person may be entitled to dower under the Statute to which this is an amendment, she shall make her election,*" &c., &c. Now, where there is no child, is one of the very cases mentioned in the Statute giving dower, and we can discover nothing in the words or context, which even seem to exclude from its

operation a case of this kind. We therefore conclude, that the complainant is entitled to make her election between dower and a child's part, in the estate of her deceased husband.

But the question recurs, what shall be the measure of the widow's interest, where she elects, under the circumstances of this case, to take a child's part? For her it is insisted, that the child's part amounts to the entire estate: that forasmuch as the child would take the entire estate; if there were no widow, so the widow will take the whole estate where there is no child. This argument scarcely has the credit of speciousness; it is wholly illogical. The act of 1828 defines very clearly the measure of her interest as dower, viz: one half; if that be not the measure of her interest under the act of 1838, then she has none. It is very evidently the intention of the Statute to place the claim of the widow upon the same footing, whether there should be one child or no child.

An argument of some speciousness has been pressed upon the Court, deduced from the assumed conflict between this conclusion and the provisions of the act of descents and distribution. If we have correctly apprehended this argument, it is, that the statute regulating descents, (the provisions of which are by subsequent enactment made the rule of distribution also,) having in case there be no child surviving at the death of the intestate, directed the property go first to the father, and if there be no father, then to the mother, brothers and sisters and their descendants, if the act of 1838, were to be so construed as to permit the widow to take the whole estate, in a case like this, it would amount to a virtual repeal of the Statute. We suppose that if this argument is tenable as to the whole, it is equally so as to the claim for the half. The idea seems to be that a consideration of the act of 1838, which will give the

fee in the realty, and an absolute estate in the personalty to the widow, would be to defeat the operation of the Statute regulating descents and distribution. Now there is no question that the act of 1838, does, in a case where there is one or more children, give to the widow a prescribed portion of the fee in the realty, and a like portion of absolute estate in the personalty. In such a case, it has never been doubted, that if she so elect, she is to be counted as a child, and that the estate is to be equally divided between the widow and the child or children, as the case might be. To the extent of her interest, therefore, the full and absolute estate, which, under the provisions of the act of descents is directed to descend to the collateral kindred, is curtailed by the operation of this Statute; and yet it has never been supposed that the two Statutes were in conflict. Why, even under the act of 1828, assigning dower to the widow, the personalty, (other than slaves,) which would otherwise go to the next of kin by distribution, is vested in her absolutely.

Entertaining this view of the Statute, we are of the opinion that the bill ought not to have been dismissed. It is therefore ordered, adjudged and decreed that the decree of the Chancellor dismissing the bill filed in this cause, be reversed and set aside, and that the cause be remanded for such further proceedings in the court below, not inconsistent with the views expressed in this opinion, as may be appropriate.

It is further ordered that the Appellees do pay the costs of this appeal.

HENRY L. PARKER, JOHN H. HOLLINSWORTH, WM. B. HOOKER AND JOHN PARKER, APPELLANTS, *vs.* FRANCIS A. HENDRY, ADMINISTRATOR *de bonis non* OF JAMES E. HENDRY, DEC'D, APPELLEE.

Where a plaintiff dies and the suit is revived by *scire facias*, it is to be proceeded within terms of the law as to the making of defences as if he had not died, and the defendant is not entitled to an appearance and trial term, as if the case had been commenced by the party newly made. If judgment is had by *nil dicit* in the Court below, the defendant should apply, if he has a good defence, to open the judgment and be permitted to plead, and cannot make his application to this Court.

This case was decided at Tampa.

The facts of the case as presented in the record, are fully set forth in the opinion of the Court, to which reference is made.

*James Gettis* for appellants.

*James T. Magbee* for appellee.

BALTZELL, C. J., delivered the opinion of the court.

Alderman Carlton, administrator of James E. Hendry, deceased, instituted his suit on the 17th day of March 1856, against Henry L. Parker, John H. Hollingsworth, Wm. B. Hooker and John Parker, to obtain payment of a note given for the sum of \$1844. The writ was served on the defendants, Wm. B. Hooker and John H. Hollingsworth, on the 25th of March, 1856. Henry L. Parker acknowledged service. John Parker was not served, not being in the county. On the 10th September the process was served on H. L. Parker, and on the 14th on John Parker.

At the October Term, 1856, the defendants entered their appearance by their attorneys to prevent a default. At

this term a suggestion was made of the death of the plaintiff Carlton, and *scire facias* ordered.

On the 5th of February, 1857, a *scire facias* issued in favor of Francis A. Hendry, who in the mean time had been qualified as administrator *de bonis non*, of the estate of James E. Hendry. This was served on the defendants on the 13th and 18th of February, and the 11th of March, 1857. On the first of April, the plaintiff entered his motion for default, and again on the 6th gave notice of a motion to make the new administrator plaintiff, which was served on the 7th. On calling of the case at the April Term, Hendry was made plaintiff, and no plea having been filed, a judgment was entered for \$2095 09 on the 8th of April, 1857. This is complained of, and we are asked to reverse it on the following grounds:

1. "Because the defendants did not have the time to plead allowed by the rules of court."

The law providing for the revival of suits in case of the death of a party plaintiff, provides that "the suit *shall proceed as if such party had not died*, and shall not abate by the death of either party, provided the cause of action would survive."—See Thompson's Digest, p. 332.

The process was fully served to the October Term, which was the appearance Term, so that the plaintiff would have been regularly entitled to judgment in case of his living at the April Term, 1857, the time when it was given, so that the judgment is rendered and the cause has been proceeded with in the terms of the act, as if the plaintiff had not died. And we see no injury to result therefrom. The party had more than twelve months to prepare a defence, and surely he cannot complain that a longer time was not allowed. If he had a meritorious defence, it should have been presented by filing pleas directly after the notification of the appointment of the administrator, and even if not fil-

ed then, the court would undoubtedly, on a proper showing, have set the judgment aside and allowed him to make a defence. Failing to do this in the court below, he may not hope to attain the same object here. Ours is not the place to originate motions for the conduct of cases nor the presentation of defences; they should be made to the court below. If refused or denied there, then the redress of the party is by application here. It is true, the rules say that pleas shall be filed sixty days before the trial Term of the court. This is for cases in their natural, ordinary and regular course. When a deviation is required or becomes necessary by facts or circumstances, it is the province and duty of the court to accommodate its action to this new state of things. Rules are, not like laws, inflexible, but made for the advancement of the great purposes of right and justice, and are to be administered in a spirit of wise and prudent discretion to attain their great object and end.

The law allows two terms to a defendant for presenting and hearing his defences, the rule requiring that these be filed sixty days before the trial Term, which if prevented by accident, it does not follow that he should have a third term to make them.

Already the time of filing pleas, of giving two terms, is complained of as occasioning improper delay, and it would ill become this court by construction to give further occasion for reproach. There is no error then in the ruling in this respect. This disposes of the general assignment of errors.

The third assignment, alleging a deficiency in the service of the process, was withdrawn and is dispensed by the record.

The fourth assignment is that the court erred in not setting the default aside, and in not giving the defendants an op-

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Hance vs. The State.—Opinion of Court.

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portunity to plead. It is not right to term this a default; it was by *nil dicit*. It does not appear by record that they desired to plead. The parties were present, they filed no pleas, asked leave to file none; how then, could the court presume that they had a defence? How can this court conclude that they had any? No doubt, if, after the judgment had been entered, a proper showing had been made of a meritorious defence, the court would have opened it. If this had been refused, then the appeal would have been the appropriate remedy. Let the judgment be affirmed.

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MARY HANCE, APPELLANT, vs. THE STATE.

In a presentation for assault and battery, it is competent for the defendant, both at common law and under the statute of this State, conferring upon the jury the right to fix the measure of punishment within certain limits, to give in evidence his general good character, although the same may not have been assailed by the prosecution.

This case was decided at Tallahassee.

For the facts of the case reference is made to the opinion of the Court.

*D. P. Holland* for Appellant.

*M. D. Papy*, Attorney General, for the State.

PEARSON, J., delivered the opinion of the Court.

The Appellant was convicted at the last term of the Circuit Court for Franklin County, of an assault and battery upon one Mary Allenger, and her punishment assessed by

the jury at six months imprisonment, upon which conviction, judgment and sentence was accordingly pronounced. The prisoner appeals, and the only error assigned, is, that upon the trial, her counsel offered to give evidence of her general good character, although her character had not been impeached by the prosecution, which the court would not permit to be introduced.

This is a question which, it appears to us, is conclusively settled, as well by reason and precedent, as by the necessary policy and effect of our statute, (Thompson's Dig. p. 490,) placing the measure of punishment in such cases at the discretion of the jury who tries the case. Mr. Starkie, in his well considered and long approved work on Evidence, (2 vol. 4 Ed. p. 363,) considers that evidence of character is admissible on three grounds—"1st. To afford a *presumption* that a particular party has or has not been guilty of a particular act. 2d. To affect the damages in particular cases where their amount depends upon the character and conduct of any individual, and 3rdly. To impeach or confirm the varacity of a witness." Upon the first and second principles here stated, it would seem the evidence offered and rejected in this case, should have been admitted. It is true that the presumption derived from character is throughout the authorities held of little avail except in cases of doubt. But the objection goes rather to the value of the evidence it affords of the perpetration or pretermission of a particular act, than to its admissibility. The objection, in other words, it will be found, is to the force and weight of a presumption arising from character, and not to the competency of such testimony.

The general rule, is that the testimony shall be confined to the issue; and in the very nature of things, why should not the moral character and conduct of a person in society

tend more or less, according to the circumstances of the case, to establish the result? Such is the case in social life. In many cases it must be potential, while in others it can have but little weight, as when opposed to full proof. Archbold in his *Criminal Pleading*, (5 Am. Ed. p. 134,) in summing up this subject, says :

“These several cases, when fully considered, will be found to be not exceptions to, but illustrations of the rule above mentioned, namely, that nothing shall be given in evidence which does not tend directly to the proof or disproof of the matter in issue.” \* \* \* \* “As to the evidence of the defendant’s character, it can be of avail only in doubtful cases. Where the probabilities of the defendant’s guilt on one side, and the probabilities of his innocence on the other, or nearly equal, satisfactory testimony of his general good character for honesty or humanity, may have the effect of raising a well founded presumption, in the minds of the jurors, that a man of such character could not have been guilty of the larceny or violence imputed, and in this sense it may be deemed evidence tending to the disproof of the matter in issue.” And to the same effect, as far as we have examined, is the doctrine laid down in all the leading elementary writers on criminal law. But the question here seems to be not so much whether character is admissible in a criminal prosecution, but which party shall have the privilege of first introducing it. We had regarded the practice as settled in at least so far as to allow the defendant his election of taking the hazard of putting his character in direct issue, by introducing testimony in relation to it. And if the reason for the principle just stated be sound, upon which this description of evidence is admitted, such practice is manifestly consistent therewith. To hold the defendant’s right of introducing his character in evidence, to rebut the probabilities of proofs arrayed against him, or

to extenuate a discretionary punishment, subject to the option of the prosecution, by first putting that character in issue, would be in effect to deprive him of the right altogether, for no good character would ever be assailed by the prosecution, and no bad character ever introduced by the defendant. The general rule laid down is, that the party who has to maintain the affirmative of the issue shall begin. Here the defendant offers his good character in evidence under the general issue. And in Archbold's Practice of the King's Bench, vol. 1, p. 169, it is expressly declared, "Where a special defence is intended to be given in evidence, under the general issue, the party shall begin who would have been entitled to do so if the defence had been specially pleaded." . . . 4 T. R. 497; 3 Camp. 368. Hence it is clear upon principle and authority, that the defendant in this case had not only the right to introduce evidence of her general good character, but to begin with the proof. This doctrine is sustained in *Star-  
kie on Ev.*, 2 vol., 364, and a case put similar to the present. "Where the indictment charges upon the defendant any violence committed against the person of an individual, or against the public peace, evidence may be adduced by him of his general character for humanity and peaceable conduct," See also *Arch. Crim. Prac. and Plea.*, 1 vol., p. 165, citing 2 Mass. Rep. 317, 3 Bibb, 196, 7 Conn. Rep. 118, and also *Wharton's Amer. Crim. Law*, 171, to the same effect. In the *State vs. O'Neal*, 7th Iredell, 251, approving the case of the *State vs. Collins*, 3 Dev. 117, and overruling the case of *Vane*, 12 Wend. 78—82, the foregoing doctrine is fully sustained.

There is one other point made in some of the authorities on this question, which perhaps deserves a passing consideration. It is this—that character should only be admitted in evidence in case of doubt. This record does not

inform us whether there was room for doubt in regard to the defendant's guilt or innocence, nor could any record do so. It is the province of a record to state the *facts and incidents* of the trial, as entered on the minutes, and not to certify doubts. Who is to determine the question, whether there be or be not doubts in the minds of the jury, until their verdict is rendered? And to clothe the court with this power of raising doubts upon the effects of evidence, for the purpose of admitting or rejecting testimony, is to allow it to invade the appropriate sphere of the jury in the determination of facts and thereby lose its character and exclusive function of determining only the law.

But it appears to us that if it were matter of doubts as to the principle at common law, of the defendant's right to adduce his character in his defence, there can be none under our statute above cited, empowering the jury to determine the measure of punishment within the Statutory limits. It has ever been the practice of the courts to admit evidence in mitigation of damages and in extenuation of punishment, where the court was clothed with a discretion in regard to the punishment. Twice this discretion has been transferred by our statute to the jury. It follows that its incidents must go with it; for it is manifest such discretion cannot be wisely and beneficially exercised without the aid of such testimony.

The judgment below must be reversed and a new trial granted.

LUTHER H. TYSON, ADMINISTRATOR OF THE ESTATE OF  
LUTHER TYSON, DEC'D, APPELLANT, vs. URIAH BOWDEN,  
APPELLEE.

A defendant in execution, after judgment in replevin, cannot sue out another writ of replevin to prevent the execution of the writ against himself and procure a restoration of the property. The Court, on application, will supercede the writ if not returned, or set it aside as irregularly issued if it be returned.

This case was decided at Jacksonville.

This was an action of replevin instituted in Duval Circuit Court.

The appellee, as Sheriff of Duval county, having in hand a writ of *retorno habendo*, directed to the sheriffs of the State of Florida, issued from Leon Circuit Court under a judgment of said Court in favor of Daniel T. Lingo against the appellant, in his individual capacity, seized eleven slaves, in compliance with the command of said writ.

The appellant, as administrator of the estate of Luther Tison, dec'd, instituted his action of replevin against the appellee to recover said slaves. At the first term of the Court thereafter, Bowden, the defendant below, by his counsel, moved to dismiss the suit, on the ground that the writ was improperly issued. On the hearing of the motion, the writ of *retorno habendo* was read in its support, and it was admitted that the slaves for whose recovery this action was brought are the same slaves which were seized by Bowden, as sheriff of Duval county, by virtue of the aforesaid writ.

The Court below dismissed the suit, on the ground that

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Tison, Adm'r. vs. Bodwen.—Argument of Counsel

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the action of replevin did not lie in such a case, and the plaintiff appealed.

*P. Fraser* for Appellant.

It will be contended by the appellant that it appears by the record that Luther H. Tison, administrator of Luther Tison, deceased, is a distinct and different person from the Luther Tison named in the writ of return, and that their rights to the property in dispute stand upon a distinct and different basis, to be established by evidence to be adduced on the trial of proper issues to be joined in the cause; that under the replevin act of this State the action of replevin will lie in all cases which do not come within the exceptions named in the act itself:

1st. The action will lie in all cases where the goods and chattels are wrongfully taken or detained.

2d. It will lie at the suit of a defendant in execution or attachment when the goods and chattels seized by virtue thereof are exempted by law from such execution or attachment.

3d. It will lie at the suit of any other person than such defendant, when such person has the right to reduce into his possession the goods so taken.—Thomp. Dig. 388.

There are but three exceptions in the act:

1st. Where property is taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this State.

2d. Where goods taken by virtue of any execution or attachment are not exempted by law.

3d. Where a third party claiming goods so taken has not the right to reduce them to his possession.

The action of replevin will therefore lie in all other cases, as the mention of these exceptions is the exclusion of all others.

There is no conflict of jurisdiction between the Circuit Courts of Duval and Leon counties, such as would arise between a State Court and a Federal Court:

1st. Because the Courts of the United States have exclusive jurisdiction of all seizures, and any intervention of a State authority which by taking the thing seized out of the hands of a United States officer, might obstruct the exercise of this jurisdiction, is unlawful.—4 Cond. R., 2 Wheaton, 1.

2d. But a State Court has no such exclusive jurisdiction. By the terms of the replevin act, a defendant in execution may replevy goods taken in execution which are exempt by law, and such goods must be replevied by a writ issued from the Court within the jurisdiction of which the goods are found, whether it be within the jurisdiction of the Court issuing the writ or that of some other Court. A Justice of the Peace may issue a replevin for goods taken in execution issuing from a Circuit Court, if such goods are exempt from execution by law, and he has jurisdiction of the amount; or, a replevin may issue from the same court out of which the execution issued, or from another Circuit Court of the State, if the property be found within its jurisdictional limits. Also a third party may have replevin for any goods seized by virtue of an execution, where he is entitled to the possession. His affidavit is *prima facie* evidence of title, and he has a right to try that issue by a jury.—George vs. Chambers, 11 M. & W., 159 and note; Denham vs. Wycokoff, 3 Wend., 281.

Where goods taken in execution are illegally replevied, the Court will not dismiss the replevin, but will attach the party for a contempt.—11 M. & W., 159 and note. And the cases all agree in applying this rule where the plain-

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Tison, Adm'r. vs. Bodwen.—Argument of Counsel.

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tiff in replevin is defendant in execution, and not when a third party brings the replevin.

*Hilton & Fleming* for appellee.

The first section of the act of February 10, 1832, (Thomp. Dig., p. 387), defines the scope of the action of replevin. Its two alternatives "goods or chattels wrongfully *taken*" and "goods or chattels wrongfully *detained*"—embrace *every case* in which this form of proceeding can be maintained. Has another wrongfully *taken* your slave?—then you may sue for him in replevin; or, does he wrongfully *detain* him (however taken)—you have the same remedy. But, unless *either* wrongfully taken *or* wrongfully detained, he may not lawfully be replevied. If these positions are well taken—and we hold them to be absolutely impregnable—it is impossible to show that the Court below erred in dismissing this case.

How were the slaves in question "taken" by Bowden? We answer, under and by virtue of writ issued out of the Circuit Court for Leon county, commanding him to take them, (*them and none others*,) designating them by name. It is admitted that the slaves now in controversy are the identical slaves which the State of Florida, speaking through this writ, commanded and enjoined Uriah Bowden to take into his possession. Then, can it be pretended that they were "wrongfully taken?" There was no mistake, such as sometimes occurs in executing a *feri facias*, when a levy is made upon one man's property to pay another man's debts. In taking these slaves the sheriff did his duty—no more, no less. They were rightfully, not "wrongfully taken." We conclude, then, that replevin in the *cepic*, at all events, did not lie for their "recovery."

But, were they wrongfully *detained* by the sheriff at the

time of their replevy by Luther H. Tison, administrator of his father? Assuredly not. He detained them by virtue of the same authority and in obedience to the same command by which he took them. We care not how good may be the title of Luther H. Tison, administrator, to this property—so soon as it was *rightfully* taken by an officer of the Court, in compliance with its writ, *it was in the custody of the law*. And, if any principle of law is settled, it is that property thus placed cannot be rightfully replevied. “As a general principle,” (say the Supreme Court of New York in *Thompson vs. Button*, 14 Johns., p. 87,) “it is *undoubtedly* true that goods taken in execution *are in the custody of the law*, and it would be repugnant to sound principles to permit them to be taken out of such custody, when an officer has found them and taken them out of the possession of the defendant in the execution,” &c., &c. And, in accordance with this principle, the same Court, in *Gardner vs. Campbell*, (15 Johns., 403,) decided that this action could not be maintained to recover chattels levied upon by the sheriff, even though *after the levy* the amount due on the execution had been paid—Spencer J., deciding that the party must seek redress in a different form of action. “The goods (said he) were lawfully taken by the defendant, and *replevin* is not the appropriate remedy.”

By a peculiar process of reasoning, it is contended, that though the 1st section may not the 3d section of the act of March 11, 1845, does sanction these proceedings. It is asserted, that the latter section, though it prohibits Luther Tison, the defendant in the execution, (in this case a writ of *retordo habendo*,) from bringing this action, does not prohibit, indeed authorizes, Luther H. Tison, *administrator*, to bring it. To which we reply: Whatever be the

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THE STATE OF NEW YORK—JANUARY 1, 1900.

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THE STATE OF NEW YORK, I, the undersigned, do hereby certify that the following is a true and correct copy of the original as the same appears in the files of the State Department, and that the same is a true and correct copy of the original as the same appears in the files of the State Department, and that the same is a true and correct copy of the original as the same appears in the files of the State Department.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the State of New York, at Albany, this 1st day of January, 1900.

JOHN A. BROWN, Secretary of State.

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Tison, Adm'r. vs. Bowden.—Opinion of Court.

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defendant in this cause—He has done nothing but his duty; and yet, if this suit may be prosecuted and the plaintiff recovers, judgment will necessarily go against the sheriff for both damages and costs. Thomp. Dig., 390, sec. 3; Phillips vs. Harris, 3 J. J. Marshall, 121, Hopkins & Moody vs. Burney, 2 Florida, 43.

4th. As to the liabilities of Luther H. Tison's bondsmen in the original suit—True these slaves have been placed in the hands of the sheriff partly through their agency, but, should the judgment below be overruled and Tison, as administrator, finally recover, those sureties will be still liable. In a suit on a replevin bond, the Sup. Court of New York (Gould vs. Warner, 3 Wend., 54,) says:

"A return of the goods to the sheriff is no answer to the action. The return required by the bond is a return to the party from whom they were taken, in pursuance of the judgment of the Court, not a mere re-delivery to the sheriff."

PEARSON, J., delivered the opinion of the Court.

This was an action of replevin brought by Luther H. Tison, administrator of Luther Tison, deceased, for the recovery of eleven slaves named in the writ. At the first term of the court after the commencement of the action, the defendant by his counsel moved that the same be dismissed. At the hearing of said motion, a writ of *retorno habendo* issued from the Circuit Court of Leon county in favor of Daniel Lingo, under a judgment of said Court against Luther H. Tison in his individual capacity, was read in support of the same. It was admitted that the slaves for whose recovery this suit was commenced in Duval county, are the same eleven slaves which were seized by Uriah Bowden, sheriff, by virtue of the aforesaid writ, issued to him as one of the sheriffs of the State of Florida

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from the Circuit Court of Leon county. On argument of the motion, the court below dismissed the suit, on the ground that the action of replevin will not lie in such a case. Thereupon an appeal was taken to this court.

For the appellant, it has been contended that Luther H. Tison, administrator of Luther Tison, deceased, is a distinct and different person in law from Luther H. Tison named in the writ of return, and that, under the replevin act of Florida, the action of replevin will lie in all cases which do not come within the exceptions named in the act itself, and that the facts do not bring this case within the exceptions.

On the other hand it is maintained that every case of replevin is embraced in the alternative, first when goods or chattels shall have been wrongfully taken; "second, when goods or chattels shall be wrongfully detained," and that the slaves in question being taken under a legal precept designating them by name, sex and age, and when detained, being in the custody of the law, this case comes under neither of these alternatives.

"Whenever any goods or chattels shall have been wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery thereof and for the recovery of the damages sustained by reason of such wrongful caption or detention in the Circuit Court or other court having jurisdiction in the county in which such property may be found."

The difficulty which presents itself at the threshold, as regards the claim of the appellant to bring this action is, that we are not able to perceive how it can be that the slaves were either wrongfully taken "or wrongfully detained" by the sheriff. The evidence is that they were taken by the sheriff in his official capacity, in fulfillment of the exigencies of the writ commanding him in the name of

the State to take these specific slaves and cause them to be returned to Daniel T. Lingo. The admission that the slaves sued for in this action are the slaves mentioned in Lingo's writ of *retorno habendo*, is an admission that they were *not* "wrongfully taken" by the appellee. Nor can we decide that they were wrongfully detained by him when replevined out of the sheriff's hands. They were *in transitu* for delivery to Lingo, to whom they had been adjudged by the Circuit Court of Leon county. In the hands of an officer of the court, by a rightful taking, *they were in the custody of the law*—a sufficient answer to the allegation that they were *wrongfully detained*.

But it is contended that the facts of this case do not bring it within either of the exceptions mentioned in the 2d and 3d articles of the 1st section of the act, and that the "mention of these exceptions is an exclusion of all others." We apprehend, however, that it does come within the inhibition laid down in the comprehensive clause with which article third concludes. That clause is as follows: "Nor shall a replevin lie for such goods or chattles at the suit of any other person, unless he shall have the right to reduce into his position the goods taken." If, as it appears to the court, these slaves, when seized by the sheriff, passed into the custody of the law, then neither the defendant in the execution *nor any other person*, had a right to reduce them into his possession; and wanting this "right," the plaintiff cannot claim the benefit of either of the exceptions set up in his behalf. Besides, as it has been argued by the opposite counsel, articles 2 and 3 were rather designed to limit and retain than to extend the privileges given by article 1st. If, then, the latter does not sanction this suit, much less can either of the former.

Our attention has been called to several cases reported where the action of replevin has been sustained against

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the sheriff to recover property levied upon by that officer in virtue of executions placed in his hands. We apprehend that, on examination, all such cases will be found to be cases where the property levied upon was not subject to the execution, and in this respect distinguishable from the cause now before the court. *Here* the slaves seized by the sheriff were subject to the officer's writ, and none others, and were rightfully taken by him.

Were authorities necessary to show that goods, when law and become *irrepleviable*, several might be cited from "*rightfully*" taken by the sheriff, go into the custody of the the adjudications of the New York courts upon their statute; of which ours is in the main a copy; In the case of *Thompson vs. Button*, (14 Johns., 84,) the Chief Justice, in declaring the opinion, said:

"As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, when an officer has found them in and take them out of the possession of the defendant in the execution."

True, the same court in *Clark vs. Skinner*, (20 Johns. 468,) denies or limits the assertion of Comyns' Digest, that "replevin does not lie for goods taken in execution;" yet, to what extent? "'By goods taken in execution,' I understand, (says the Judge,) goods *rightfully taken*, in obedience to the writ, but if through design or mistake the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were taken 'in execution' in the true sense of the rule laid down by Baron Comyns." The rule thus limited is quite broad enough to cover the present cause.

A still stronger case is that of *Gardner vs. Campbell*, (15 Johns. 401,) in which it was held that "replevin will not

lie against an officer who, having levied upon and taken goods in execution, receives from defendant the amount due on the execution, and then refuses to re-deliver the goods." In delivering the opinion of the court, Spencer J., said:

"The conclusive objection to all the pleas is that, confessedly, the defendant (the sheriff,) took the plaintiff's goods under and by virtue of the process of the Court, and they are, in the language of this court in *Thompson vs. Button*, in the custody of the law, and it would be repugnant to sound principles to allow them to be taken out of such custody, when the officer has seized them in obedience to the exigency of the writ in his hands. The pretence set up is that the execution was paid and satisfied; whether it was or not makes no difference in the principle. If the fact be true, the plaintiff is not without his redress. He cannot be allowed to set up that fact to divest the sheriff's possession. The goods were lawfully taken by the defendant, and replevin is not the appropriate remedy."

The consequences likely to spring from a different ruling, are well worthy of consideration. Among these may be mentioned (as has been suggested,) a conflict between the jurisdiction of the Circuit Courts of Middle and East Florida; the exposure of the sheriff and his securities to a judgment of damages and costs for acts performed in the plain discharge of his duty; the exposure of Lingo to a loss of property by the results of litigation to which he is not a party; and finally, a harassment of the original securities of Luther H. Tison by a suit on his replevin bond, from which it is by no means certain that they could escape or be discharged by any judgment rendered in this cause."

The cases we have referred to are of execution for debt,

&c. Had they been of positive command to the sheriff for the delivery of property by plaintiff to defendant, after trial and solemn adjudication, we can easily imagine that the language of those enlightened courts would have been far more peremptory and decided, as they unquestionably should be on every principle of right reason.

To allow a defendant in such an execution, not only to defeat it, but reverse its action and have property ordered to be delivered by him to plaintiff restored and returned, and that through process used to commence a suit would be unheard of. It would be changing the practice of the court in a very material respect, by giving superior efficacy and force to the institution and commencement of a suit over its end and termination. The case of *Morris vs. DeWitt* resembles this in some degree, decided by the Court of Appeals of New York. There a quantity of iron ore was delivered to one of the parties on a writ of replevin, the other party sued out other writs by which it was re-delivered, and a motion was made to quash the last writs. The court say, "the law has provided guards against abuses in practice under the writ of replevin. By the revised statutes, not only a bond with sufficient security must be given, but the plaintiff must make affidavit of his title to the property replevied. The defendant may have the question of property tried before the officer making replevin, and even after verdict against him, the plaintiff may still claim deliverance of the property by giving further security. Now all this is a very useless proceeding if the defendant in replevin can turn round and bring his action of replevin, and thus regain possession of the property which has been legally taken from him. If such a proceeding were permitted, there would be no end to suits, and the benefit of this action could never be realized. The writs, however, can not be set aside as irregularly issued, for they are not re-

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Heffron vs. The State.—Statement of Case.

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turned, but they may be superceded and a rule for that purpose is granted.”—5 Wend. 712.

The writ here will be set aside. Such indeed we regard as the practical effect of the dismissal of the case, so that the process from Leon Circuit Court will proceed undisturbed.

Let the judgment of the court below be affirmed with costs.

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MARY HEFFRON vs. THE STATE OF FLORIDA.—(TWO CASES.)

1. Under the provisions of our statute, the defendant in a criminal case has a right to the concluding argument before the jury, when he introduces no testimony on the trial.
2. The statute which secures to the defendant in criminal cases the right to the concluding argument, is mandatory in its character, and a denial of the right by the court may be the subject of a bill of exceptions.

These cases were decided at Tallahassee.

Two indictments were found against the appellant for selling liquor to a negro, upon which she was convicted at the fall term, 1857, of the Circuit Court for Franklin county.

The defendant, having upon the trial offered no evidence, claimed the conclusion of the argument before the jury, under the act of the General Assembly, approved January 3d, 1853, which enacts, “that from and after the passage of this act, in all cases wherein the defendant upon his trial introduces no testimony, he shall, by himself or

counsel, be entitled to the concluding argument before the jury, as is now the practice in the trial of civil cases.”

The Court below denied the defendant the right to conclude, upon the ground that it was clearly and manifestly the intent of the Legislature, in the passage of the above recited act, to conform the practice in criminal to the practice in civil cases; and, inasmuch as at the time of passing such act of conformity, there was no such practice in civil cases as would give the defendant the conclusion of the argument, when he introduced no testimony, the said act of January 3d, 1853, conferred no right upon the defendant in a criminal prosecution which he did not possess before.

*D. P. Holland* for the Appellant.

*M. D. Papy*, Attorney General, for the State.

DUPONT, J., delivered the opinion of the court.

The appellant was tried and convicted in the Circuit Court of Franklin county, upon two indictments, for selling spirituous liquor to a negro. The appeal was, by consent of counsel, transferred from Marianna to Tallahassee, and has been argued at this term of the court. In the one case, the only error assigned is the refusal of the Judge who presided at the trial to permit the counsel for the prisoner to conclude the argument before the jury. In the other case, the same error is assigned, with several others, which it becomes unnecessary to consider, inasmuch as the views which we entertain upon that point are decisive of both cases.

The statute (Pamph. Laws of 1852-3, page 116) provides, that “in all cases wherein the defendant upon his trial introduces no testimony, he shall, by himself or counsel,

be entitled to the concluding argument before the jury, as is now the practice in the trial of civil cases.”

On the part of the appellant it is insisted that the force and effect of the statute is the grant of a positive right, which it is not in the power of the court to disregard or abridge. For the State, it is contended by the Attorney General, that it was the evident intent and object of the statute to assimilate the practice in this particular in civil and criminal proceedings, and that in the absence of a rule of court giving that privilege in civil proceedings, the statute is wholly nugatory. It is further insisted, that even if the practice on the civil side of the court should be found to have accorded this privilege, yet that being a mere matter of practice and within the discretion of the court, a denial of the right is not such an exception as that error can be predicated upon it.

Without undertaking to determine what is or ought to be the practice of the circuit courts in civil cases, we have no hesitancy in saying that the statute was intended to secure to the defendant the right to conclude in criminal cases, where he introduces no testimony, and that the requisition is mandatory. As to the policy and propriety of the provision, it is not our province to determine. It is true that in the “Rules of Practice” which have been framed for the government of the circuit courts, there is no rule prescribing the practice in this particular, yet by reference to the books on practice, it will be found that such a rule prevailed at common law.—(1 Arch. Practice 172.) Whether or not, in the absence of a positive rule on the subject, the circuit courts are bound by the common law rule, we do not decide, nor are we informed what is the practice in those tribunals in civil causes.

On the second point made by the Attorney General, we find by reference to the case of Day vs. Woodworth, (13

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*Heffron vs. The State.—Opinion of Court.*

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How. S. C. Repts. 363,) in which it is ruled that 'the right to open and close is so far dependent upon the discretion of the court below, that it is not the subject of a bill of exceptions.' By a careful examination of this case, it will be seen that the ruling of the court is based upon the assumption that the right here claimed was a mere "matter of practice, and that the Circuit Court of Massachusetts had the right to make its own rules." The decision is evidently placed upon the ground that error cannot be predicated upon the exercise of a discretionary power. If we are correct in our conclusion, that the right claimed in the cases before us, is one growing out of a positive exactment of the Legislature, and that it is mandatory in its character, then it is manifest that the authority referred to can have no bearing with us.

The court is of opinion that the judge who presided at the trial of these cases erred in refusing to permit the counsel for the defendant to close the argument before the jury, he having introduced no testimony to support the defence. Therefore let the judgments pronounced in the two cases respectively be *reversed*, the verdicts be set aside and a new trial be had.

ARCHIBALD HENDRY AND MARY ANN, HIS WIFE, APPELLANT, *vs.* JAMES M. CLARDY, DANIEL BELL AND OTHERS, APPELLEES.

1. Where a bill is brought against the guardian by a ward to compel him to account for certain slaves alleged to have been received by him from the estate of the father of the ward, a plea by the guardian that they had been recovered from him in an action of detinue, prosecuted by the administrator on the father's estate, constitutes a good defence.
2. The hires of the slaves accruing prior to the recovery by the administrator follow the title of the property, and are due to the administrator and not to the ward.
3. Where a plea in bar to the original bill has been sustained upon demurrer, a supplemental bill, filed afterwards, and before the final decree, confessing and avoiding the matters set up in the plea as a defence, ought to be answered by the defendant, and it is error to dismiss it upon demurrer.
4. Where a bill for account is brought against a guardian and the sureties on his guardian bond, the final decree, if for the payment of money, should be so framed that it shall be enforced against the sureties only in the event that the money cannot be made out of the principal.
5. Where one of several wards brings his bill for account against his guardian, the other wards who may be interested in the general funds, must be made parties to the suit.

This case was decided at Tallahassee.

For the facts of the case reference is made to the opinion of the Court.

*Walker & Call* for appellants.

*William H. Mitchell* for appellees.

DUPONT, J., delivered the opinion of the court.

This was a proceeding in equity instituted by the appellants against a guardian and the sureties on his guardian bond. The original bill alleges that James M. Clardy, in

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his capacity of guardian, had possessed himself of several large sums of money and of certain slaves, in which the appellants claimed an undivided interest, and asking that the said Clardy and his sureties might be required to account for the same and for the hires of the slaves and the interest of the money.

To this bill the sureties on the guardian bond interposed a general demurrer, which was overruled by the Chancellor and they ordered to answer the bill. The defendant Clardy also filed his answer denying the receipt of the sums of money charged to have been received by him; and, as touching the slaves, he pleaded specially in bar that they had been recovered from him in an action of *detinue* by the administrator on the estate of Thomas T. Clardy, deceased. To this plea the complainants filed their demurrer, which was overruled, and the plea held to be a bar to so much of the bill as was covered by it.

After these proceedings were had, the complainants then obtained leave to amend their bill, which they did, and also filed their *supplemental* bill, in which they alleged, amongst other things, that since the filing of the original bill and the proceedings had thereon, they had discovered that an arrangement had been made between Watts, the administrator, and Clardy, the guardian, touching the judgment insisted upon in the plea as a bar to their recovery, by virtue of which arrangement and compromise the slaves, which had been recovered from the guardian in the action of *detinue*, were permitted to remain in his possession in his capacity as guardian, and that he has ever since held them in that capacity; that the judgment for the slaves recovered by Watts, the administrator, had never been executed otherwise than by carrying out the terms of the said arrangement, and that

the administration on the estate of Thomas T. Clardy had been closed and the administrator discharged.

To the supplemental bill, James M. Clardy, the guardian, and Daniel Bell, one of the sureties on his bond, filed their joint and several demurrer, which was sustained, and the supplemental bill ordered to be dismissed.

The Chancellor then proceeded to pronounce a final decree in the cause, which is in the following words, to wit:

“This cause having been, by agreement of counsel, set for hearing on the first Monday in December, 1857, came on this day to be heard on bill, answer, plea, exhibit, supplemental bill and demurrer—whereupon it is ordered, adjudged and decreed that the supplemental bill be dismissed. It is further ordered, adjudged and decreed that the complainants have no equity to recover from the defendants the slaves and their hires mentioned in the original bill of complaint in this cause, and that so much of said bill as relates to the slaves and their hires be dismissed. It is further ordered, adjudged and decreed that the complainants have an equity to recover from the said defendants their proper distributee share of any such moneys as the said James M. Clardy may have received as their guardian from the estate of Wm. Gore, deceased, and that it be referred to take evidence of such sums of money as he may have thus received, and of the interest of complainants in the same, and report the same to this Court,” &c.

The appeal is from this decree of the Chancellor, but there has been no petition of appeal presented by the counsel for the appellant setting forth the grounds for appeal, in accordance with the rule on the subject, and we might well refuse to consider the case; but having consented to hear it, we will proceed to examine the questions which, in our opinion, are presented by the record.

In looking into the record, we perceive but two rulings

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Hendry and Wife vs. Clardy et al.—Opinion of Court.

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of the Chancellor which could be assigned by the appellants as grounds of exception: the one being the overruling of their demurrer to defendant's plea in bar, and the other ordering the supplemental bill to be dismissed. We will consider these questions in the order in which they are here presented.

In order to a proper understanding of the views of the Court on the first point, it is necessary to refer to the allegations of the original bill touching the possession of the slaves by Clardy, the guardian. The substance of these allegations is, that James M. Clardy, one of the defendants, Mary Ann, the wife of the complainant Archibald Hendry, and three others, were the minor children of Thomas T. Clardy, deceased; that letters of guardianship of these minors were granted to the said defendant, who, by virtue of his office of guardian and having an equal undivided interest in the estate of his deceased father Thomas T. Clardy, took possession of the slaves and absolutely refused to account for them or their hires to the said complainants. The defence set up in the plea of defendant is, that the slaves were recovered from him by an action of *detinue* instituted by Watts, the administrator, as the property of his father's estate.

The demurrer confessed the facts set forth in the plea, and we are at a loss to conceive how in this state of the pleadings the Chancellor could have done otherwise than to have sustained the plea by overruling the demurrer. It certainly constituted a good defence for the defendant, that the slaves had been recovered from him by the paramount title of the administrator; and, with reference to the hires which had accrued, it is also manifest that they must follow the title of the property, and that he was not accountable for them as guardian. We are therefore of the opin-



ion that there was no error in overruling the demurrer to the plea in bar.

The next point for consideration arises out of the order for the dismissal of the supplemental bill. The bill was evidently framed with the view of supplying the defect in the original bill, by a statement of facts, which, if established, might remove the bar presented by the plea to the original bill. The substance of these facts is, that after the recovery of the slaves by the administrator, an arrangement and compromise was entered into between him and the defendant, by virtue of which he was permitted to retain the possession of the slaves as the property of his wards, and to control the same in his capacity as guardian. What was the definite character of that arrangement, or the specific terms of the compromise, is not stated in the bill, nor was it indispensable that they should have been stated, as the allegations was open to the response of the defendant. It may be that the administrator, out of the back hires of the slaves in the hands of the defendant, or out of other assets coming to his hands, had been enabled to satisfy and discharge the debts existing against the estate of Thomas T. Clardy, deceased, without restoring to a sale of the slaves for that purpose, and having discharged the debts, he could only have settled his administration and procured his discharge by delivering over to the newly appointed guardian, the balance of the estate remaining in his hands for distribution. At any rate, the defendant's demurrer confessed the allegation, that he had received the slaves from the administrator and that he held them in his capacity of guardian, and as the property of his wards. In this state of the pleadings, the proper course would have been to have required an answer from the defendant, and not to have dismissed the bill. It is quite ev-

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ident, that if by the answer of the defendant or by proofs *aliunde*, this allegation should be established to be true, it would constitute a good replication to, and avoidance of the bar attempted to be set up in the plea.

For the guidance of the Chancellor, it may not be inappropriate to remark, that if in the further progress of this cause, a final decree for the payment of money should be made against the defendants, it will be proper so to frame the decree, that it shall be enforced against the sureties only in the event that the money cannot be made out of the principal. This we deem to be equitable, and in full accordance with the spirit of the statute which provides for the collection of money out of sureties. Indeed in a proceeding like this, it would be highly inequitable to permit the sureties to be harrassed, by an execution, before it had been fully established that the principal was unable to respond to the amount of the decree.

In the case of Wiser vs. Blachly, (1 John. Ch. R. 607,) which was a suit for account brought by an infant against his guardian and the representative of the surety, the Chancellor said: "Perhaps it will be premature to take an account of the assets in the hands of the Executor of the surety, until the default of the principal and his inability to pay are first ascertained."

In that case the bill as against the Executor of the surety was not dismissed, but it was retained to abide the result of the investigation as to the ability of the principal to respond to the amount which might be found to be due by him to his ward. In cases of this kind, the surety ought always to be made a party to the taking of the account, but the execution should go out against him only in the event of the inability of the principal to pay.

In the further proceedings to be had in this cause, the complainants must be required to amend their bill, so as

to make all other persons, who are interested in the general found, if any such there should be, parties, in order that there may be a final termination of the litigation.

Upon a full consideration of this case, it is ordered, adjudged and decreed, that the decree of the Circuit Court herein be *reversed* and set aside, and the cause be remanded for such further proceedings to be had therein, as may be in conformity with the views expressed in this opinion. It is further ordered that the appellees do pay the costs of this appeal.

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JAMES S. JONES, APPELLANT, *vs.* WILLIAM STREETER, APPELLEE.

In a plea to an action on a promissory note, given for the purchase of an article, it is not sufficient to state that the article purchased was unsound and unfit for use, or that fraudulent misrepresentation respecting its character had been made by the seller; there must be a distinct allegation, going to show that the defendant had suffered a loss upon the purchase.

This case was decided at Tampa.

The facts presented by the record are set forth in the opinion of the Court, to which reference is made.

*James T. Magbee* for appellant.

*James Gettis* for appellee.

DUPONT, J., delivered the opinion of the court.

This was an action of assumpsit brought by the appellee against the appellant in the Circuit Court of Hills-

borough county. The declaration contained a special count on a promissory note alleged to have been executed and delivered to the plaintiff by the defendant, and also a count on an account stated. To the first count the defendant filed a plea of "partial failure" of consideration, and to the second count he filed the plea of *nil debit*. These pleas were demurred to and the demurrer sustained. The defendant then filed an amended plea in the following words, to wit: "And the said defendant by his attorney says that the said promissory note was signed and delivered by defendant to plaintiff for and in consideration of a buggy, which the plaintiff fraudulently represented to the defendant, at the time of the sale of said buggy to defendant, that said buggy was whole and sound, and the defendant in fact says that said buggy at the time of said sale was badly broken and wholly unfit for use, and this he is ready to verify," &c. There was a demurrer likewise to this plea, which was sustained and judgment given for the plaintiff as for the want of a plea. The error complained of is in the overruling of this plea.

The plea in this case was evidently intended to raise the defence of a "failure of consideration," but the facts stated therein (even if they would amount to a defence,) are so defectively set out that we think the Court was right in sustaining the demurrer. It is true that the plea alleges that the note was given for the buggy, and that the buggy was badly broken and unfit for use at the time of the sale and purchase, but *non constat*, that the defendant had not received a benefit from the purchase and indeed full value for the note given by him. By his own showing, the plaintiff had been enabled to sell the buggy to him notwithstanding its dilapidated condition and unfitness for use, and there is nothing in the plea to negative the idea that he had not been equally fortunate in dispos-

ing of it for a sound price. The plea should have alleged expressly the failure or (under our statute) the partial failure of the consideration for which the note was given, in order to constitute it a good plea. It is defective for the want of certainty.

Let the judgment be affirmed with costs.

BALTZELL, C. J., dissenting.

I do not concur in the opinion delivered in this case, nor in the decision made. It is difficult to imagine, it seems to me, a better defence than this plea presents. If an article sold be unsound and unfit for use, it *has no real value*, and this circumstance of itself, and still more when connected with other indications, will imply and sustain a charge of fraud.—1 Parsons on Contracts, p. 362. Even if there were no fraud in the case, but the agreement be unreasonable and unconscionable, the Court would give only reasonable damages.—*Ibid*, p. 362. But here there is not only an allegation of unsoundness and unfitness, but that there was a fraudulent representation, and this admitted by the demurrer. I see no reason to question for a moment the sufficiency of the plea, and think the Court should have sustained it. The decision of the Court in *Stafford vs. Andrews*, decided by this Court at its present session, is almost in point, and I cannot see how the present case is made with reference to the unanimous opinion then given. The only difficulty I had about the case was, that the defendant should have returned the buggy on discovering its unfitness. The opinion of the Supreme Court of the United States in *Withers vs. Greene*, 9 How. S. C. Rep., 220, is so full to this and the other points of the case as to leave me nothing to add, and I therefore give it entire:

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*Jones vs. Streeter.—Dissenting Opinion.*

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Mr. Justices DANIEL delivered the opinion of the court.

This cause, from the District Court of the United States for the Middle District of Alabama, is brought here under the act of Congress of 8th August, 1846, Ch. 104.

The plaintiff in error was sued in the court below, upon a single bill for the sum of \$3,000, executed by him on the 16th of February, 1839, payable on the 1st of January ensuing, to A. B. Newsom or order, and which was assigned by Newsom to May, the testator of the defendant.

What were the grounds of defence first assumed by the defendant does not appear, and it is immaterial now to inquire. The pleas first filed were by consent of parties withdrawn, and by leave of court the defendant filed a special plea, averring that the note sued on was given by him for a part of the price of two fillies purchased by him of Newsom for \$4,000; that Newsom falsely and fraudulently represented to the defendant that these fillies were reared by himself; that they were sound and of high pedigree (as is set forth in the plea); that the defendant, desiring to possess these fillies for their blood and for the turf, and induced and deceived by the false representations of Newsom, paid him the sum of \$1,000 in cash, and executed the note in question for the residue of the purchase-money; that the representations of Newsom as to the fillies having been reared by him, of their soundness, and of their pedigree, were all untrue, and all known to be untrue by Newsom at the time of the sale; that the defendant did not ascertain either the extent of the unsoundness of these fillies, or the falsehood of the pretended pedigree, until during the autumn and winter of the year 1839; that the said Newsom at the time of the sale resided, and has continued to reside, in a different State, and more than three hundred miles from the defendant; that from the time of discovery by the defendant of the unsound-

ness of the fillies, and of the falsehood of their pedigree, up to the time of their death, which happened without any fault of the defendant or his servants, in the spring of 1840, he, the defendant, was willing and ready, and desirous, of returning the fillies to the said Newsom, but never had an opportunity of so doing. The plea concludes with stating, that the note or writing obligatory was obtained from him by Newsom by his false and fraudulent representations, and is therefore void; and with a prayer whether defendant should be charged with the debt. To this plea there was a demurrer by the plaintiff below, and the judgment of the court below sustaining the demurrer, brought hither by writ of error, this court is called on to examine.

Although the legal principles and inquiries involved in this cause are to a great extent local in their character and operation, it will be found to embrace rules, both with respect to pleading and to the interpretation of contracts, extending in some respects beyond the influence of merely local jurisprudence. The contract in question having been made within the State of Alabama, and designed to be performed within that State, the *lex loci contractus* must justly be understood as entering into and controlling the effect of its stipulations, and having been sued upon within the same State, the *lex fori* must, in a great degree, regulate the mode of its enforcement.

By a statute of Alabama (see Aikin's Digest, p. 289, § 138), it is enacted, "that, whensoever any suit is depending in any of the courts founded on any writing under the seal of the person to be charged therewith, it shall be lawful for the defendant or defendants therein, by a special plea, to impeach or go into the consideration of such bond, in the same manner as if the said writing had not been sealed." By another statutory provision of the same State it is declared (see Aikin's Digest, p. 328, § 6), "that all bonds,

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obligations, bills single, promissory notes, and other writings, for the payment of money or any other thing, may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon previous to assignment, and in all actions to be commenced and sued upon any such assigned bond, obligation, bill single, promissory note, or other writing aforesaid, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein." By the enactment herein first cited, it is obvious that specialties are divested of any force or solemnity at any time ascribed to them by reason of their having a seal annexed, and are placed, with respect to all inquiries which may be instituted into the validity of their consideration, precisely upon the footing of parol agreements. With respect to the construction of the second provision (§6) of the statute above cited, the question has been suggested, whether the right conferred by the first enactment, to inquire into the consideration of contracts in contests between the original parties, is extended, by the correct meaning of the statute, to the defence allowed to obligors at the suit of assignees, or whether obligors in assigned bonds, notes, &c., are not restricted in their defence to transactions posterior in date to the writing itself, and forming no necessary part of the original consideration, the language of the statute, as already quoted, being this:—"shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same" (i. e. against the bonds) "previous to

notice of assignment, in the same manner as if the same had been sued and prosecuted by the obligee therein."

In construing these provisions of the Alabama statute as being *in pari materia*, we cannot regard them as changing the rights of the parties arising out of the contract itself, nor as conferring new rights on others not inherent in such original obligations, but we regard them rather as securing those rights, except so far as they may have been legally and justly transferred. There could be no doubt of the right to impeach the consideration, or the right to claim the benefit of payments, set-offs or discounts, on the part of the obligor as against the obligee. The statute was not designed to take from the obligor any of these rights, but merely to deny to him the claim to discharge his obligation by payments, &c., to the original obligee, after he knew he knew the obligation to have been transferred to another. Neither did the statute create in the assignee any new right varying the character of the contract itself. It conferred on him merely the rights to take by assignment, and to sue in his own name—in effect, the power to acquire in the mode prescribed an equitable title, and to prosecute that title in a court of law. Contracts at common law, to which the simple power of assignment is extended by statute, differ essentially from those which arise out of and are governed by the law-merchant, or from such as are placed on the footing of the law-merchant by express legislative enactment. We conclude, then, that, in a case like the present, the obligor would have the right to impeach the consideration for which the writing was given, or to show its discharge by payments or set-offs made or existing at any time before notice of assignment, or by discounts to prove either a total or partial failure of the consideration for which the writing was executed, accord-

ingly as the truth of the case would warrant either defence. This interpretation of the law we consider as accordant, not only with the language and the rational meaning of the statute, but as sustained by the decisions of the courts in the State whose peculiar policy we are discussing, and by decisions in other States upon statutes containing provisions similar to those in the statute of Alabama. Recurring to the later statute itself, its terms declare that whenever, that is, in every case, in which suits shall be instituted founded on any writing under seal, the person to be charged therewith, comprehending any and every person, whether he sustains a relation to an assignee or to any other person, may impeach the consideration of the bond or other writing (Aikin's Dig., p. 233, § 138), and then proceed with respect to the rights and powers of the assignee to provide, that he may sue in his own name, and may maintain any action which the obligee or payee might have maintained thereon, previous to assignment (Aikin's Dig., p. 328, § 6); he has the same rights and remedies which pertained to the obligee or payee, and none other.

And first, with respect to the defence as against the assignee, founded on the total failure of consideration, it has been ruled under the statute of Alabama, in the case of Clemens vs. Loggins, 2 Alabama, 514, that when the payee of a note is inquired of by one wishing to purchase it whether he has any defence against it, and answers that he has none, he does not thereby preclude himself from making any defence against the note growing out of the original transaction, of which he had no knowledge at the time. And it will be found that the example put by the court in this case (see p. 519) is one of total failure of consideration. Yet this defence could never be permitted if it is to be sought for within a narrow interpretation of the words *payments*, *set-offs*, and *discounts*,—such a one as would

not embrace the true character of the transaction. Again, in the case of *Wilson v. Jordan*, in 3 *Stewart & Porter*, it is said by the court, on p. 98.—“The decisions of this court have gone far to abolish the distinction with us between the effect of a partial and total failure of consideration”; and again, the court uses this language:—“Nor do we feel the least dissatisfaction with our former decisions, so far as they tend to place partial and total failure of consideration on the same footing, instead of driving the parties to circuity of action.” The doctrines ruled by the Supreme Court of Alabama are closely coincident with those of the courts of other States, in the construction of statutes similar to that of the former State. Thus, in the case of *Clements v. Loggins*, 2 *Alabama Reports*, 514, as late as 1841, the courts, by way of illustration, refer to the cases of *Buckner v. Stubblefield*, 1 *Washington*, 296, and of *Hoomes v. Smock*, *Ibid*, 390, decided by the Court of Appeals upon the Virginia statute, a law more restrictive in its terms than is the Alabama statute, as the former speaks only of just discounts against the obligee, being silent as to payment and set-off, (see 3, *Stat. at Large*, 376; 4 *ib.* 275; 6 *ib.* 87; 12 *ib.* 358, and Acts of 1795, and of January, 1820,) and both the cases thus referred to are instances of entire want of consideration, the writings assigned having been void *ab initio*.

It seems proper in this place to advert to an opinion of the Supreme Court of Virginia, in one of the earlier cases before them under the statute, with respect to any change which that statute might have been supposed to produce in the relative situations of parties to contracts made assignable thereby. In the case of *Norton v. Rose*, in 1796, reported in 2 *Washington*, the law (on page 248) is thus expounded by Roane, Justice, with the concurrence of the whole court:—“It was not intended to abridge the rights

of the obligor, or to enlarge those of the assignee beyond that of suing in his own name; and since it is clear that, prior to this law, an original equity attached to the bond followed it into the hand of the assignee, this law does not expressly, nor by implication, destroy that principle." The same doctrine was ruled in Pennsylvania, as early as the year 1776, in case of *Wheeler v. Hughes*, reported in 1 Dallas, 27. In Pennsylvania, bonds, bills, and promissory notes were by act of Assembly made assignable, as promissory notes in England under the 3d and 4th of Anne, but as the statute of Pennsylvania omitted to declare that those writings "should be placed upon the footing of bills of exchange," it was therefore decided that the assignee of such writing stood in the same place as his obligee or payee so as to let in every defalcation which the obligor had against him before notice of the assignment, and that the only intent of the act of Assembly was to enable the assignee to sue in his own name, and to prevent the obligee from releasing after notice of assignment. This doctrine has been frequently reaffirmed in the same State, as will be seen in 2 Dall. 45; 6 Serg. & Rawle, 175, and 16 ib. 20.

Turning next to a class of cases founded on what has been denominated the partial failure of consideration, although involving bad faith, breach of warranty, false and deceitful warranties, false representations in the procuring of contracts, such as might in particular aspects extend to the entire rescission of contracts, it will be seen that the Supreme Court of Alabama have, in the construction of their statute, ruled that a defence founded on either or on all of the facts here enumerated shall be admissible in diminution of damages. And in allowing this mode of defence, which seems to fall more strictly within the import of the terms *set-offs* and *discounts* than objections aimed at the total abrogation of contracts can do, the

courts of Ala. have acted in accordance with those of other States in construing statutes similar to their own, consistently, too, with the principles of reason and justice adopted by modern tribunals when acting apart from statutory provisions. The case of *Moorehead vs. Gayle*, reported in 2 *Stewart & Porter*, 224, was an action by the assignee against the maker of a promissory note, given for the price of a slave warranted sound. The defence set up was the unsoundness of the slave at the time of the contract, as evidenced by his early death and by other circumstance. The court in this say, that, if it had been necessary to offer to return the slave to permit this defence, yet by the early and sudden death of the slave the vendee would, under the circumstances, have been excused from making the offer; and in considering the right of the vendee to avail himself of the defence, either of a total or partial failure of consideration, the court are led to compare the principle enunciated in the case of *Thornton vs. Wynn*, 12 *Wheaton*, 183, with the doctrine as laid down in the State of Alabama, under her laws, and with respect to the rule of *Thornton vs. Wynn* remark as follows:—"It was the most rigid that has anywhere prevailed against relief by way of defence to the action at law. It was doubtless adopted as a part of the system which has been exploded in this State and in many States of the Union; as well as in several of the English courts, that a partial failure of consideration is not a defence to an action at law, brought to recover the price of the article sold, but that in such cases the vendee must resort to his cross action, which remedy, on account of its dilatory nature and circuitous form, is by this court and many others of high authority deemed inconsistent with justice, and the more correct rules of modern practice."

The earlier case of *Peden vs. Moore*, reported in 1 *Stew-*

art and Porter, 71, furnishes a still more full exposition, by the Supreme Court of Alabama, of the rules of decision deducible from the law of that State. The action in *Peden vs. Moore* was brought to recover the amount of a promissory note. The defence pleaded was failure of consideration, payment, and set-off;—whether total or partial failure of consideration does not appear in the form of the pleading, and it would seem that, so far as the form of pleading was involved, the fact of the failure being total or partial, was deemed immaterial by the courts, and was a question of proof, inasmuch as the court below regarded as allowable, and even as indispensable, proof of total failure, whilst the Supreme Court decided that proof of partial failure was admissible, and that the exclusion of said proof in that case was error in the inferior court. The defendant below moved the court to instruct the jury, that, if they believe the consideration had failed, except to the amount which had been paid, they should find a verdict for the defendant. This court refused, but instructed the jury, that unless a total failure of consideration was proved, they should find a verdict for the plaintiff. In reviewing the opinion of the court below, the Supreme Court of Alabama say: “It is our policy to avoid circuitry of action, that litigation may be stopped in the germ, before it is permitted to put forth its branches. This idea is most strikingly illustrated by our statutes providing for arbitration and set off, as well as by the decisions of our courts. Now, to permit a defendant to allege in diminution of a sum sought to be recovered by breach of his contract, that the consideration which induced the contract on his part has partially failed, would have the effect of making one action subserve the purpose of two, and upon the score of convenience it must be unimportant to the plaintiff whether his recovery is diminished, or whether, after having re-

covered the entire sum, he is compelled to refund a portion of it; or, if important, the importance would consist in ending litigation, and avoid the costs of the defendant's action. And surely it would be more compatible with justice, to permit a party to retain that which *ex equo et bono* cannot be demanded of him, and which by law he may recover back; and more especially, when none of the great principles of right or the landmarks of property would be disturbed. Perhaps it may be said, that the inquiry is too complex for the determination of an ordinary jury. Not so. There would be no more difficulty in ascertaining the sum to be deducted from the defendant's indebtedness, than in admeasuring the quantum of the damages sustained in an action for a false warranty, or for a deceit. In either case, the jury will naturally inquire the sum which was agreed to be paid, and to what extent the consideration is deficient; so that the obstacles to the achievement of justice will not be greater in the one instance than in the other. We are entirely aware of the decisions which inhibit the defence even of a total failure where there is a warranty on which the defendant may have his remedy. These decisions doubtless proceed upon the principle that the warranty is a subsisting contract, and the damages sustained by its breach unliquidated. We consider them, however, so far shaken, if not overruled, as to leave the question open for examination. Upon authority, both in point of respectability and numbers, it is clearly provable that, where fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages. This qualified admission of the defence originated from the rule, that fraud avoids the contract *ab initio*. In point of justice, we can discover no sufficient reason for permitting the defence to set up


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where there is fraud in the transaction, and in denying it when there is a false warranty unaccompanied by fraud. In either case, it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained; for the old common-law notion, that fraud so vitiated every contract which partook of it as not to allow of a recovery, though it but partially impaired the benefit with which the defendant expected to derive, has been exploded; more recent authority only allowing it to go in reduction of damages. The cases of *Poulton vs. Lattimore*, 9 Barn. & Cress., 259, of *Germaine vs. Burton*, 3 Starkie, 32, and *Miller vs. Smith*, 1 Mason, 437, are cases in which the defendant had the plaintiff's warranty, yet this circumstance is not considered by the courts which decided them as interposing an obstacle to the defence!" The court in conclusion, with respect to this defence, remark: "Believing, therefore, that the greater benefit would result from its toleration, we are of opinion, that wherever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or of a non-compliance by the plaintiff with his part of the contract, he may, in defence to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained."

These copious extracts from the opinions of the Supreme Court of Alabama are thought to be warranted, not only on account of the intrinsic force of the reasoning they contain, but still more so, perhaps; from the fact that they present the best and most authoritative interpretation of the statutes they are meant to expound, as well as of the policy in which those statutes have had their origin. But beyond the influence and effect of these decisions as expositions of local law, they may be regarded as coincident with the doctrines promulgated by the highest tribunals of



a portion at least of the States of the Union, and as not conflicting, in principle, at least, with some of the later opinions of the English bench. By the earlier English decisions the following principles appear to have been inflexibly ruled, namely: That whenever a contract was tainted by fraud, it never could, if it were shown, be made the foundation of a recovery to any extent, but must be set aside *in toto*. That in all instances wherein a party was injured either by a partial failure of consideration for the contract, or by the non-fulfillment of the contract, or of a warranty, the person so injured could not defend himself in an action on the contract, by proving these facts, but could find no redress only in a cross action against the plaintiff. These rules of the common-law courts appear to have yielded materially to the influence of common sense and common convenience. An example of this may be perceived in the permission given in cases where a recovery is sought upon the principle of *quantum meruit*, to set up as a defence that the plaintiff has unfairly, or injuriously, or imperfectly fulfilled his obligations towards the defendant; and that he should in such cases recover so far only as he could prove a meritorious performance; admitting, in these instances at least, the defence founded on discount or on a partial failure of consideration, or a dishonest performance. See the cases of *Basten vs. Butter*, 7 East, 479; of *Farnsworth vs. Gerrard*, 1 Camp., 38; of *Denew vs. Daverell*, 3 Camp., 451; of *Poulton vs. Lattimore*, 9 Barn. & Cress., 259. In the case of *King vs. Boston*, 7 East, 481, on a note, the plaintiff had sold a horse to the defendant, warranted sound, for twelve guineas, of which the defendant had paid three. In fact, the horse was not sound, and, the defendant refusing to pay more, this action was brought for the value of the horse to recover the dif-

ference. It was proved that the horse at the time of the sale was not worth more than £1 11s. 6d., and that the defendant had sold him for £1 10s. Lord Kenyon held that the plaintiff could only recover the value, and more having been paid him by the defendant, he nonsuited the plaintiff. *Caswell vs. Coare*, 1 Taunton, 566, was an action upon a warranty of a horse. It was ruled in this case, that, if the horse is not returned, the measure of damage is the difference between the true value and the price given, which may be shown. Indeed, the ground on which the English judges have restricted this species of defence to cases of *quantum meruit* implies the admission that there is nothing in the character of the defense itself, with respect to express undertakings, that is inconsistent with justice or with the true obligations and duties of the contracting parties. The objection is this, that if in suits on contracts for specific undertakings, and for stipulated compensation, the defendant could, under the general issue, be let in to show either failure of consideration or non-performance, the plea not disclosing either ground, would effect a surprise upon the plaintiff; but that where, as on a *quantum meruit*, the plaintiff was to show a meritorious cause of recovery, he must be prepared to encounter any and all objections in conflict with the position he assumes and must maintain. With all the respect due to the learned men by whom this distinction is made, it may be permitted to doubt whether it is not perhaps more apparent and technical than real; for it may be asked, whether in cases of contract for specific performances and for stipulated equivalents, the plaintiff is not equally bound to prove an honest performance—such a one as comes up to the equivalent promised by the defendant? Indeed, it would seem, so far as danger of surprise is to be apprehended, that where the rights and duties of parties were

set forth in the contract, and in the pleadings founded upon the contract, there would be less danger of surprise than there possibly could be in instances where the forms of proceeding indicated neither, but where everything was left open to contest at the trial.

The remarks of some of the English judges appear to be peculiarly applicable to this view of the subject. Lawrence J., in *Basten vs. Butter*, 7 East, 484, speaking of the distinction attempted between a *quantum meruit* and other forms of action, says: "The rule laid down by Mr. Justice Butler may be a good one, if the plaintiff has had no notice of the kind of defence intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the work done, I think the defendant ought to be let into his defence. For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he would have engaged to do, the doing of which would be the consideration for the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was properly done." And Le Blanc, J., remarked: "I think that in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a sum, as where it is general to do such work. If a man contracted with another to build him a



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house for a certain sum, it surely would not be sufficient for the plaintiff to show that he had put together such a quantity of brick and timber in the shape of a house, if it could be shown that it fell down the next day, but that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed."

It would seem, then, to be fairly deducible from the reasoning of the English judges, from the case of *Basten vs. Butter*, in 7 East, decided in 1806, to that of *Poulton vs. Lattimore*, 9 Barn. & Cress., ruled in 1829, that this defence would by the judges themselves be deemed permissible, whenever it could be alleged without danger of surprise, and consistently with safety to the real rights of the parties; and it appears to be a deduction equally regular, that, where notice of the defence was given, either by pleading or by any other effectual proceeding, neither surprise nor any other invasion of the rights of the parties could occur, or be reasonably apprehended. But however the rule laid down by the courts in England should be understood, it has repeatedly been decided by learned and able judges in our own country, when acting, too, not in virtue of a statutory license of provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party, when sued upon such contracts, and that he shall not be driven to assert them either for protection or as a ground for compensation in a cross action. Thus, in the cause of *Runyan vs. Nichols*, 11 Johns., 547, the Supreme

Court of New York decidethat, in an action upon an attorney's bill, the defendant might give evidence of neglect of duty on the part of the plaintiff, if this defence was set up by plea, or after a notice to the same effect given to the plaintiff before the trial. In *Becker vs. Vrooman*, 13 Johns., 302, it was decided by the same court, that in an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or, if the defect produced merely a partial diminution of the value, he may show that in mitigation of damages. In the case of *Sill vs. Rood*, 15 Johns., 230, which was an action on a promissory note given for the price of a chattel, the defendant was allowed, under the general issue, to show deceit in the sale. And it was holden further, that a promissory note given for the price of a chattel represented to be valuable, when in truth it was of no value, is without consideration and void. In the case of *Grant vs. Button*, 14 Johns., 377, the suit was for the price of work and labor, and it was ruled that the defendant, in order to reduce the amount of the plaintiff's claim, might show that the work was not done faithfully and in a workmanlike manner. This, too, was the case of a contract for an agreed price. In *Spaulding vs. Vandercook*, 2 Wendell, 433, Chief Justice Savage, in delivering the opinion of the court, says: "In *Beecker vs. Vrooman*, 13 Johns., 302, it is settled that deceit in a sale of a chattel may be shown in a bar or in mitigation." The doctrine of the cases just cited, deduced from principles of justice and from the beneficial purposes of preventing circuity of action, would seem to apply with decisive influence to subjects falling within the range of a polity, by which those doctrines were peculiarly and authoritatively commended. We cannot doubt, therefore, after a full examination of the questions on this record, that, under the

provisions of the statute of Alabama pleaded in this case, the plaintiff in error had the right to reply in his defence, either upon a fraud practiced on him in the formation of his contract, or on a false or fraudulent warranty, or on a total or partial failure of the consideration on which the contract was entered into by him, or on any payments, discounts, or set-offs, in the language of the statute, "made, had, or possessed by him," provided that the last three grounds of defence shall have come into existence, and been justly belonging to the plaintiff in error, before he had notice of the assignment of his obligation.

A doubt has been suggested as to the power of the plaintiff in error to defend himself, by reason either of fraud or of failure of consideration,—a doubt arising, not from any want of verity of the facts in either of those averments, but from the form of the pleadings in the cause. Thus it is said, that, if he designed to avoid the contract for fraud, he should have averred his disclaimer immediately on a discovery of the fraud, and his proffer to restore the property to the defendant in error, which it is thought the plea has not done. Secondly, it has been supposed that, if a diminution of the price alone was intended, the plea should not have concluded with averring that the writing was procured by false and fraudulent representations, and was therefore void; or with a general prayer for judgment whether the defendant below should be charged, &c. With respect to the pleas in bar, it may premised, that they are never construed with the severity which is applied in resting pleas that are merely dilatory. If, by rational intendment, they meet the case of action, or, in the quaint phrase of the old writers, they are certain to a general intent, they are deemed sufficient. If their structure merely, and not their substance, is to be assailed, this must be done by a special demurrer; a proceeding by no means

avored, as it has rarely any real relation to the merits of the controversy. The averments in this plea with respect to the readiness to return the property are these:—First, that the defendant below resided at a greater distance than three hundred miles from the plaintiff, and in a different State. Secondly, that, from the time at which the defendant below discovered the unsoundness of the fillies, and the falsehood of their pedigree, he was ready and willing, and desirous, to return them, and would have returned them to the plaintiff, if he had had an opportunity of so doing, which he had not. The law requires of no man that which is unreasonable or impracticable. *Lex neminem cogit advana seu impossibilia*. In this case, the defendant bewlo avers his want of power to rid himself of that which he also avers has been fraudulently imposed upon him, and the plaintiff by his demurrer admits the fact, and the character of the fact, as set out in the plea. But it has been said, that the defendant below might have tendered a return of the property by notice through the post-office, and was therefore bound to do so. It may be inquired whether this position does not involve a *petitio principii*. Does not the averment of absolute destitution of the power to return the property imply the absence of all the means leading to that measure, and carry with it the necessary inference of ignorance of the locality of the plaintiff, or of his post-office? A letter directed to the State of Tennessee, generally, or to some place more than three hundred miles from the defendant below, and in a different State, might, and probably would, have been as unavailable for any practical purpose as a letter addressed to the State of New Hampshire. The plaintiff in error has averred his inability to return the property, and the defendant in error admits the truth of the averment. But the objection to this issue in law is properly applicable only to that as-

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*Jones vs. Streeter.—Dissenting Opinion.*

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pect of the case which places the rights of the plaintiff below exclusively on the ground of a total rescission of the contract. If the purchaser chose to retain the property, and either to sue upon the warranty of pedigree and soundness, or to defend himself upon the ground of difference between the true and the pretended value of the property, he was bound neither to give immediate notice, nor to tender a return of the property; he would be permitted to discount the difference between the real and the simulated value. But here the difficulty already mentioned is suggested, namely, that this defence is inconsistent with the conclusion of the plea, which says, "and said defendant saith, that the said sealed note or writing obligatory was obtained from him by the said Newsom, by false and fraudulent representations, as aforesaid, and is therefore fraudulent and void in law, wherefore said defendant prays judgment whether he ought to be charged with said debt," &c. This conclusion is said to call for an entire rescission of the contract as founded in fraud, and cannot be reconciled with the facts previously stated as constituting a cause for partial relief.

We have already said that pleas in bar are to receive, if not a liberal, certainly not a narrow and merely technical construction; and we will further observe, that if the difficulty suggested be sound, there never could be a defence in mitigation of damages where there should be alleged fraud in the inception of the contract, or where there should be a false or deceitful warranty, however willing the defendant might be to accept the difference between the real and the pretended value, and however circumstances might place it beyond his power to return the property. The injured party would in all cases be driven to repudiate the whole contract, or to go without compensation. This course, however, we have seen is, in contra-

vention of the current of decisions which admit of the defence in mitigation of damages. But pleas in bar are always construed according to their entire subject-matter, and will be sustained accordingly, as taken altogether, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial. It seems, moreover, that the prayer for judgment, or conclusion of such pleas, is not considered as essential to their validity. Thus it is stated by Chitty, vol. i., p. 558, speaking of pleas in bar, "that this prayer, before the recent rule," (alluding to the rules of pleading adopted in England in the 4th of William IV.) "ought properly to have corresponded with and been founded upon the commencement of the plea, and the effect of the matter contained in the body of it;" but, continues this author, "as the court would *ex officio* give judgment in favor of the defendant according to the substance of the plea, without reference to the conclusion, an error with regard to the prayer of judgment in the concluding part of the plea was not material, except in the case of a plea in abatement." In the case of *The King vs. Shakespeare*, 10 East, 87, upon a demurrer to a plea in abatement, Lord Ellenborough said: "Praying judgment of the indictment means no more than praying judgment on the indictment, and if this were the case of a plea in bar, the court would give that judgment which, upon the whole record, appeared to be the proper judgment, though not prayed for by the party. But, in abatement, the court will give no other than the proper judgment prayed for by the party; and, without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they would be in the case of pleas in bar." In *Atwood vs. Davis*, 1 Barn. & Ald., 173, it is said by

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Bayly, J., that "there is a distinction between a plea in bar and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter." In the case of *Rowles vs. Lusty*, 4 Bingham, 428, upon a writ of entry, it was ruled that the prayer for judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land. And in this last case, *The King vs. Shakespeare and Attwood vs. Davis* are cited as authority.

But again, (and this appears to give a conclusive answer to any objection to the admission here of proofs in diminution of damages,) if we must treat this case according to the strictest rules of pleading, it might be said that the plea averring the note to have been obtained by fraud, which is admitted by the demurrer, would be sufficient to entitle the defendant below to a judgment on a declaration counting merely on the note, without regard to the question of total or partial rescission of the original contract. And then, if the plaintiff could be entitled to recover at all, it must be on a count on the original contract, or on a *quantum valebat* for the thing sold, and this would open the entire range of enquiry as to the character of the contract, and as to what in truth constituted the *quantum valebat* on which, if on anything, the plaintiff could found himself.

Upon this branch of the case, we think the matter averred in the special plea of the defendant below was legitimately pleaded under the statute, and with sufficient certainty and pertinence to authorize a defence on the grounds of a false and deceitful warranty, or of a partial failure of consideration, and that he should have been let in to sustain, if he could, such a defence before the jury. We therefore consider the judgment of the District Court to be er-

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Tison vs. Mattair.—Statement of Case.

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roneous, and do adjudge that the same be reversed, and that this cause be remanded to that court, with instructions to cause an issue to be made up on the special plea filed by the defendant below, under the statute of Alabama, and a *venire facias* to be awarded to try that issue.

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WILLIAM H. TYSON, APPELLANT, *vs.* CAROLINE MATTAIR,  
APPELLEE.

1. Property of the wife vested in the husband previous to the married woman's law, is not affected by its provisions so as to make it her separate property.
2. A deed of gift to a *married woman and the heirs of her body*, to the said wife and her immediate offspring, to have and to hold the property to their "*own proper use and behoof forever*," will not constitute a separate estate in her according to the principles and rules of Courts of Equity.

This case was decided at Jacksonville.

William H. Tyson recovered a judgment in the Circuit Court of Columbia county against Henry Mattair, the husband of the appellee, on the 20th day of December, 1855. Upon this judgment execution was issued on the 31st day of January, 1856, which was levied on a negro slave named Primus, as the property of the defendant in execution. Caroline Mattair, the wife of Henry Mattair, defendant in execution, interposed her claim, under the statute, to the negro slave levied on, as her property.

On the trial of the right of property before the Court, (a jury being waived,) Tison, the plaintiff in execution, offer-

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Tison vs. Mattair.—Statement of Case.

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ed and read in evidence, the judgment and execution in his favor against Henry Mattair.

He also read in evidence the testimony of S. L. Niblack, who testified that the indebtedness for which the suit of Tison again Henry Mattair was brought, was for merchandize purchased of the firm of S. L. Niblack & Co., of which witness was a partner, but he has now no interest in the result of the suit; that in the year 1852 he was advised by his attorney that the property held by the heirs of Henry Jones (of whom the claimant is one,) under his deed, were subject to the debts of the husbands of said heirs; then he recollects of seeing the boy Primus in the possession of Henry Mattair about the year 1840 or 1841, and that he has been in his possession ever since.

A. Y. Allen, a witness for plaintiff in execution, testified that the boy Primus was in the possession of Henry Mattair in the year 1842.

Caroline Mattair, the claimant, offered and read in evidence a deed of gift from her father, Henry Jones, established in lieu of the original which had been destroyed, as follows:

## DEED OF GIFT.

STATE OF FLORIDA: In the Circuit Court of Columbia county, December 21, 1847, present the Honorable Geo. W. Macrae, Judge of said Court.

Caroline Mattair

vs.

The executors of Henry  
Jones, deceased.

} Motion to establish lost deed.

It having been made to appear to the satisfaction of the court that the original deed of gift from Henry Jones, deceased, to Caroline Mattair, was destroyed among the files of papers in the clerk's office, and the same had heretofore

been recorded; on motion of W. M. Ives, Esq., attorney for said Caroline Mattair, it is ordered that the paper writing herein filed be established in lieu of the original, in the words following, the same being satisfactorily proved to be a substantial copy of the deed so destroyed, viz:

This indenture, made this third day of November, one thousand eight hundred and forty, between Henry Jones, of the county of Columbia and State of Florida, of the one part, and Caroline Mattair, youngest daughter of the before named Henry Jones, of the same county and State, of the other part, witnesseth, that the said Henry Jones, for and in consideration of the natural love and affection which he has and bears unto the said daughter Caroline Mattair, and also for and in consideration of the sum of one dollar to him in hand paid by the said daughter Caroline, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have given, granted and enfeoffed and confirmed unto the said Caroline Mattair, wife of Henry Mattair, and the heirs of her body, the following description of property, to wit: a negro man named Primus, aged about twenty-three years; a negro woman named Clarissa, aged about 17 years, and a negro man named William, aged about 12 years, the said Caroline Mattair and her immediate offspring to have and to hold the above described property to their own proper use and behoof forever.

In witness whereof, I have hereunto placed my seal and affixed my signature the time and date above stated.

HENRY JONES, [*Seal.*]

Recorded February 2, 1848.

Joseph M. Crews, a witness for the claimant, testified that in 1842 he had a conversation with Henry Jones, the father of the claimant, who stated that he had deeded the

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*Tison vs. Mattair.—Statement of Case.*

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boys Primus and Bill, and the woman Clarissa, to his daughter for her own use; that he had worked hard for the property and he wanted his daughter to have it, so that it should not be subject to Henry Mattair's debts at any time. It has been generally understood that both these boys belonged to Mrs. Caroline Mattair. Witness knows that Henry Mattair has been refused credit repeatedly, as far back as 1850, on account of the negroes belonging to his wife. He has several times tried to sell these negroes, but his wife would not agree to it, and the trades were abandoned. The firm of S. L. Niblack & Co. was composed of William H. Tison, the plaintiff in execution, and S. L. Niblack. S. L. Niblack, one of the firm, knew that these negroes belonged to Mrs. Caroline Mattair before this debt was created.

Asa A. Stewart, another witness for claimant, testified that in 1838 the negroes Primus and Bill belonged to Henry Jones, the father of the claimant. Witness was told by Jones that he had deeded certain property to his children already married, and that he would deed certain property to his daughter Caroline when she married, and mentioned the negro boy Primus as one he would give or deed to her. After Caroline married, the boy Primus went immediately into her possession, and her father Jones called him Caroline's negro. It has been generally known that these negroes belonged to Mrs. Mattair for years back, at least for eight years back.

Douglas O'Neil another witness for the claimant, testified that he heard Henry Jones declare, in relation to certain property which he had given to his daughter Caroline, that he was going to make it safe to her and to her children, that she was not in good health and that he intended that what he gave her should be secure so that she might always have the benefit of it, and not be subject to any per-

son's debts, and that the boy Primus was one of the negroes that was given to Caroline Mattair. The two boys have always been considered Mrs. Caroline Mattair's. Henry Mattair is a dissipated, improvident man, and Henry Jones knew the fact. Has heard Jones express this as one of the reasons for his giving the property to his daughter separately.

Charles B. Collins, another witness for the claimant, testified that he was called upon by Henry Jones, while he, witness, was Clerk of the Court, to draw a deed, which he did, and in that deed he gave to his daughter, Mrs. Caroline Mattair, certain negroes. To the best of witness' recollection the negroes were Primus, Bill and Clarrissa, which negroes he gave to his daughter Caroline Mattair during her natural life, and at her death to go to her children.

In the opinion pronounced by the judge in the court below, it is stated, that it "further appears from the record that said Henry Mattair became indebted to S. L. Niblack & Co. in two promissory notes, one dated January 29, 1853, and the other dated March 20, 1854, and that the judgment in favor of the plaintiff in execution was recovered upon said notes."

The court below gave judgment for the claimant, and the plaintiff in execution appealed.

*Hilton & Fleming* for Appellant.

It is contended for the claimant, and was so held by the Court below, that by virtue of the second section of the act of March 6, 1845, the negro slave Primus, levied upon under the plaintiff's execution, is the separate property of the wife of the defendant in the original suit, and, as such, not subject to be taken in execution for her husband's debts. That section reads as follows: "Married women may *hereafter*," &c. (See Thomp. Dig., 221.)

To this we reply, that before the passage of this act the said slave had become the property, by an absolute title, of the husband Henry Mattair. Having been conveyed by Henry Jones, in 1840, to his daughter Caroline Mattair, (then married,) by a deed which, had she been a *feme sole*, would have vested a fee simple right in said Caroline, (see *Watts v. Clardy*, 2 Florida R., 390,) said slave became *at once*, in accordance with the well established principles of the common law, the absolute property of the husband. We feel that we should first beg pardon of the Court before arguing so plain a proposition, yet as it is decisive of the case, we adduce a few authorities, confining ourselves to the most elementary text-books, viz :

Roper's Husband and Wife: "Marriage is an absolute gift to the husband of all the goods, personal chattels and estate which the wife was actually and beneficially possessed of at that time in her own right, and of such other goods, and personal chattels *as come to her during the marriage*."—Vol. 1, p. 166.

Bright's Husband and Wife is to the same effect, nearly in the same words: "Marriage is an absolute gift to the husband of the goods, personal chattels and estate of which the wife was actually and beneficially possessed, at the time of the marriage, in her own right, and of such goods and personal chattels *as come to her during marriage*."—1 Bright's H. & W., p. 34.

"But, as to chattels personal in possession which the wife hath in her own right, (says Blackstone,) as ready money, jewels, household goods and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again *revest* in the wife."—2 Com., 435.

Broom's Commentaries on the Common Law may be referred to in the same connection, (*vide* p. 417.)

In Comyn's Dig., (Baron & Feme,) it is said:

"So if chattels are given to the wife after coverture, the interest vests in the husband."

We will trouble the Court with but one or two reported cases decided in accordance with these well-established principles. In the case of *Carne vs. Brice* and another, (M. & W. Exchequer R., vol. 7, p. 183,) it was held by all the Barons, that "the property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage and paid to her by the trustees of the settlement, vests by law in the husband and is liable to be taken in execution for his debts." See also *Bird & Pegram*, 76 English Com. R., p. 638; *Washburn vs. Hale*, 10 Pickering, 429, and *Griswold vs. Pennyman*, 2 Conn., 564, (cited in notes to *Bright on H. and W.*, vol., p. 37.)

But it is said that there is no evidence that the husband "ever received this negro solely in the exercise of his marital rights and for the purpose of its appropriation to his own use." To which we answer that there is evidence, positive and explicit, of the husband's possession for years anterior to the act of 1845, from which possession the presumption of law is that he was in possession *as owner*, and it is for those who contend that he held possession for his wife (were not such a holding at common law an absurdity), to show that he held in any other capacity than as owner. But we affirm that such a holding before the act of 1845 was an absurdity. The husband could not, had he desired so to do, hold personal property (not settled upon his wife) as her agent, so that his possession should be hers. The existence of the wife being merged in the husband, her possession would indeed be his, but not his hers. "Whatever may have been the intent of the hus-

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Tison vs. Mattair.—Argument of Counsel.

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band, (say the Supreme Court of Mass., in Washburn *v.* S. Hale,) looking at it as a mere legal question, as the courts are bound to do, the gift of money by a husband to his wife is merely void." (Quoted in notes to *1 Bright's Husband and Wife*, p. 37.)

The circuit judge has attempted to sustain his decision by reference to the ruling of the Supreme Court of New York in *Holmes vs. Holmes*, 4 Barb., 299—a ruling deemed by his honor "peculiarly in point," being, as he says, "under the same statute passed in that State." And we apprehend we have here the key to the error committed by the judge below in his ruling. The statute of New York is *not* the same as that of Florida. True, its first section tallies substantially with the first section of the Florida act, as does its third with our second; but then there is the second section of the New York act, designed, however abortively, to secure to women already married at the time of its passage, property previously theirs, *to which there is no corresponding section in the Florida law!* And it is under that section expressly cited that the case of *Holmes vs. Holmes* was ruled. It is in the following words: "The real and personal property and rents, issues and profits thereof of any female *now married*, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female." &c. How different are the terms and purposes of this second section of the New York act from the second section of the Florida act, is seen by reference to the first line of the latter, as follows: "Married women may *hereafter* become seized or possessed of real and personal property during coverture, by bequest," &c. The purpose of the New York second section was to give to women already married a title to property acquired by them *previous* to the passage of the act; that of the Florida second

section to give to married women, whether married or not at the date of the act, their *future* acquisition.

Having thus briefly compared the provisions of the two acts, let us see what have been the rulings of the New Yorks courts under their statute. His honor, our Circuit Judge, in rendering his opinion, had manifestly before him two New York decisions, viz: Snyder vs. Snyder, 3 Barb. S. C. Reports, 62, and Holmes vs. Holmes, 4 Barb., 295. He quotes from both, though only the latter is formally cited. When (for example) he says, "the true construction of this second section, therefore, is, that so far as there shall be any property upon which the law could operate, the same provisions contained in the first section for the protection of the property of females who should marry after the passage of this act, should be applicable to the property of females married before the passage of the act," he quotes nearly *verbatim* from *Snyder vs. Snyder*, 3 Barb. When, subsequently, however, his Honor is arguing to show that the negro, even though proved to be in the possession of the husband, must, so long as it could be traced, be deemed the wife's, he quotes expressly from *Holmes vs. Holmes*, 4 Barb. We need not repeat, that both these decisions were upon a section of the New York act not found in that of Florida. What we call to the especial attention of the Court is, that *both of these decisions are against the claimant* in the case now at bar. In *Snyder vs. Snyder*, Harris, J., ruled, that "there is nothing in the language of this section which indicates that the Legislature intended it should apply to the property which such females had at the time of the marriage or had acquired during coverture. On the contrary, the husband had, by virtue of the marriage, acquired a legal title to such property, and in no proper sense *could it be said to be the property of the wife.*" And so the judge decided against

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the claim of the wife. In *Holmes vs. Holmes*, Barculo, J., although when he says (as quoted by our Circuit Court) that “the act in question, if valid, most clearly gives this money to the plaintiff,” (the wife,) he would seem to create hopes in favor of Mrs. Mattair, very summarily and effectively dashes them by deciding *against its validity*, because, 1st, “it is beyond the scope of legislative authority to destroy vested rights of property;” 2d, because “a violation of that clause in the Constitution of the State which declares that no person shall be deprived of life, liberty or *property* without due process of law;” and, 3d, because, “as regards the rights of property existing prior to its passage, by virtue of the marriage relation, *it impairs a contract within the inhibition of the Federal Constitution.*”

Our opponents, then, are placed between the two horns of a dilemma, from *both* of which it is impossible for them to escape without a fatal goring. If they fly to *Snyder vs. Snyder*, we meet them with the language of Judge Harris, “that as to such property as the female had at the time of the marriage, or had acquired during coverture, the husband, by virtue of the marriage, acquired a legal title to such property, and in no proper sense could it be said to be the property of the wife.” Do they fall back upon *Holmes vs. Holmes*, we reply in the words of Judge Barculo, used in that case: “It is impossible, therefore, in my opinion, to avoid the conclusion that the act of April 7, 1848,” (corresponding to ours of March 6, 1845,) “so far it is intended to affect *existing rights of property in married persons, is unconstitutional and void.*”

But mark! both of the fore-recited decisions were made on the second section of the New York act, with which no section of the Florida act corresponds; and, though the 3d section of the New York statute is substantially the same

as the second of the Florida statute, yet no one in the New York courts seem to have contended that their 3d section could or was intended to affect rights of property existing at the time of its passage.

In conclusion, we refer the Court to the late New York case of Perkins vs. Cottrell, 15 Barb., 446, in which it seems to have been definitely settled that "the second section of the act of 1848" was intended to apply only to property acquired after its passage and taking effect; also to Westervelt vs. Gregg, 2 Kernan, 202, (U. S. Dig., vol. 16, p. 344.) where it is held that "the statute of New York of 1848, for the better protection of the property of married women, cannot divest the husband of his right to a legacy to his wife under the will of a person deceased in 1840, and to obtain payment of which legal proceedings had been commenced by the husband and wife before the passage of the act, although the legacy had not been reduced to possession."

BALTZELL, C. J., delivered the opinion of the Court.

This is a claim on the part of Mrs. Caroline Mattair to a negro boy, Primus, levied upon to pay her husband's debts, under the execution of the plaintiff, Tison. Her title is asserted through a deed of gift from her father, Henry Jones, "to his youngest daughter, for and in consideration of natural love and affection, *to her and the heirs of her body*—the said Caroline Mattair and her immediate offspring to have and to hold the above described property *to their own proper use and behoof forever.*" From the proof in the case the property came to the possession of her husband, Henry Mattair, immediately after the marriage, about the year 1840, and has so continued ever since. Whether it shall be regarded as the possession of the wife, will depend upon the words and language

of this deed. If it creates a separate estate, independent of the husband, possession will follow the right, and he be regarded as holding for her, and his possession be hers.

"The words, *to and for her use*," "in a gift to a *feme* have been adjudicated insufficient to create a separate estate—so determined by the master of the Rolls, and his decision afterwards affirmed by the Chancellor." *Jacobs v. Amyatt*, 1 Mad. 376.

In *Johns vs. Lockhart*, it was held "that a legacy to a *feme covert* to her *own* use and benefit," is not to her separate use—(note to 3 Brown's Chy. Rep., p. 318.)

In five subsequent cases in the English Courts, the same doctrine has been held. *Wills vs. Sayer*, 4 Mad. 409; *Roberts vs. Spicer*, 5 Mad. 491. In the case of *Kensington vs. Holland*, it is said "a gift to a wife 'for her own use and benefit' does not clearly express such intention, nor to a husband for a wife's own use and benefit." 2 Myl. & Keen, 184.

In *Tilor v. Lake*, the words "to be paid 'into her own proper hands for her own use and benefit,' were held insufficient." 4 Simons, 144. So as also "the words 'to her own proper use and benefit,' were held insufficient." 2 Hare, 49.

It is not pretended that the word "behoof" in this deed adds any thing to the other words. It seems to be equivalent to "benefit" in the cases cited.

In Alabama, it has been held that the "words 'to the use and *behoof* of the wife' and 'to have the use and benefit of the labor and services of the said slaves and all the proceeds thereof during her life,' do not create a separate estate." *Scott vs. Abercrombie*, 14 Ala., 270—803.

Abundant other cases to the same effect will be found in the American Courts, but it is unnecessary to extend them.

It is said that the authorities "afford but an uncertain"

light to guide the footsteps of the enquirer after truth, and we are remitted to the application of elementary principles "as the only unerring guide to correct conclusions."

How the inference is attained that there is an uncertain light on this subject, it is difficult to understand. The eight cases referred to above are directly in point, and have not been overruled. If they are, it has not been shown to the court, nor have we been able to find any such in our extended examination and research. So far from it, the text books in England speak of the laws as settled, thus—"expressions which have been held in sufficient to raise a trust for the wife's separate estate are 'to be paid to her and for her use,' 'to her own use and benefit.'" 2 Roper, Husband and Wife, 164.

"However the intention to create a separate estate must be clearly and unequivocally expressed in order to deprive the husband of his marital rights. Thus it has been held that a simple trust 'for her own use and benefit' will not create a trust for her separate use," quoting *Wills v. Sayers*, *Roberts v. Spicer*, *Kensington vs. Holland*, *Byles v. Spencer, &c.*, *Hill on Trustees*, 420.

"Legacies to married women 'for their own use and benefit,' have been held not to be separate property." 2 *Bright, Hus. and wife*, 208; so also *Clancey*, 267.

In justice Story's great work on Equity Jurisprudence, we find language to this effect: "Under what circumstances property given, secured, or bequeathed to the wife shall be deemed a trust for her separate and exclusive use, is a matter which, upon the authorities, involve *some nice distinctions*." After enumerating on the one hand the words and language that will exclude the marital rights and create a separate estate, he says, "on the other hand, a gift or bequest after marriage to a married woman, 'for

her own use and benefit,' has been held not to amount to a sufficient expression." 2 Story Eq. 610.

Chancellor Kent, in his Commentaries, makes no objection to the rules thus laid down, although he is vehement on the subject of the *right of disposition* of the *feme* in her separate estate, evidently preferring his own views to those of the court of New York in the case of *Jacques v. The Methodist Ep. Church*, 17 John Rep. 548, in which he was overruled.

In a recent American work of merit, the general rule of the English Courts on the subject is given without dissent, and with a distinct reference to the cases quoted above of *Tilor v. Lake, &c.* 4 Bouvier Institutes, 274.

So that in reference to the words of this instrument, there is not only no uncertain light, but a remarkable clearness and certainty. So far from uncertainty, there is entire unanimity, full harmony and accord of opinion. And when it is remembered that these decisions were given by the Court of Chancery in England in its highest estate, composed of the first intellects, men renowned for their integrity, to which is to be added the concurrence of our own judges, jurists and lawyers of highest intelligence, standing and character, there will be found no little hazard in the assertion that there is uncertainty. If eight decisions on the very question, without a single one overruling or in opposition, with the full concurrence of the American Courts and elementary writers, both in this country and England, will not settle a point, will produce uncertainty, what is to be regarded as adequate to effect certainty and to remove doubts?

This uncertainty, it is said, makes it necessary to resort to *elementary principles*, and that these give a separate estate to the wife. They will be found to be to this effect: "By marriage the husband and wife are as one person in

law. The very being or legal existence of the woman was by the ancient common-law suspended during the continuance of marriage, which gives an absolute right to the husband in all his wife's chattels, personal in possession, a qualified right to her choses in action, and a conditional right to chattels real, if he survive her, irrespective of his right to alien them at his pleasure during her life-time. The husband becomes liable for all debts and obligations of his wife incurred before the coverture. The reasons upon which the law virtually suspends the existence of the woman during coverture, appear to be those first for her husband's safety in depriving her of the power to injure him by any act, without his concurrence or his assent, either expressed or implied, and secondly for her own security in guarding against the husband's influence over her, by disabling her from disposing of her own property, except by those methods and with the solemnities which the law itself prescribed." 1 Ropers, Husband and wife, p. 1.

"It is well known that the strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate, separate from or independent from her husband." 2 Story's Eq. 606.

Such were the elementary principles governing this relation and the property belonging to or conveyed to the wife, when the Courts of Equity in the beginning of the last century recognized a separate interest and estate in her. They did it with a declaration, and using language of this character—"Courts of Equity will not deprive the husband of his wife's property, to which he is by law entitled, unless the intention be clear that he is not to derive any benefit from it, and that it shall be clear for the personal use and disposition of the wife." 2 Bright, Husband and wife, 206.

"The purpose must clearly appear, beyond any reasonable doubt, otherwise the husband will retain his ordinary legal and marital rights over it." 2 Story's Eq. 608.

"Such a claim on the part of a married woman being against common right, the instrument under which it is made must clearly speak the donor's intention to bar the husband, else it cannot be allowed. It will appear from the cases that the strongest evidence of intended generosity and of bounty towards the wife will not be sufficient to give her a separate estate, unless in addition language be used by the donor clearly expressing the exclusion of the husband, or else directions be given with respect to the enjoyment of the gift wholly incompatible with any dominion of the husband." Clancey, 262.

"The intention to create a separate estate must be clearly and unequivocally expressed, in order to deprive the husband of his marital rights. And in modern times, judges have required much more stringent expressions for this purpose, than were once considered sufficient." Hill on Trustees, 420.

The decisions in South Carolina are accordant with these views. "The bequest is to her. This gives an absolute estate in personal property, and she would have the absolute right to dispose of it during her life, or at her death, unless she were a married woman and thus disqualified by law from exercising rights of ownership over it, in which case her being and her rights are blended with her husband's. The addition of the words (at her disposal at her death,) do not of themselves add to or enlarge her interest in or power over the property previously bequeathed to her. If it had been intended to give her a sole and separate estate, free from the control of her husband, not subject to his debts, and subject to her disposition by deed or will, it would have been easy to have made such provisions, and

the law is so desirous to extend to the citizens the right of disposing of their property, according to their affections, wishes and even caprices, that it will recognize and give effect to such departure from the general rule. It does, however, require that the expression of such intent should be plain, explicit and unequivocal, else there will be a continual conflict from the desire to raise up implication of an intention to give a sole and separate estate to the wife from slight expressions, leading to unceasing litigation." This was a bequest to a wife of personal property to her, and at her disposal at her death, and was held not to exclude the marital rites. *Graham v. Graham's Exrs.* 143.

The elementary principles appealed to, plainly and manifestly in this case give the property to the husband; for if the intent be not plain, explicit and unequivocal, if there be an "uncertain light" as to the meaning of the words and language of the instrument, then by the elementary principles prevailing, as well at law as in equity, the separate estate is not created, but the property is subject to the marital rites.

Again, it is urged that "intention, relation of the parties and the context, exercise an important relation," and it is argued that the fact of "this lady's being a married woman when the gift was made, is a circumstance from which the intent should be inferred." The opposite of this is clearly shown by the authorities already adduced, but more clearly in the decision made at a very early period, in which "H. B. bequeathed £100 to the plaintiff's wife, to be paid within six months after the testator's death, and a bill being filed by the husband for this legacy against the executor, his defence was that he had paid the wife and had her receipt for the money, and it was argued for the defendant, the executor, that it must have been the intention of the testator to have bequeathed this sum for the separate

maintenance of the wife, for that at the time of making the will the plaintiff and wife lived separately, and that she was much straightened in her circumstances, which was known to the testator. However, the Lord Keeper held it to be no good payment.”—1 Raith. Vern., 261; Clancey, 262.

If our own opinions were less fixed on the subject, we should feel great reluctance in disturbing a rule of property prevailing so long and with such universal acceptance and approval. It is nearly a century since the first decision was made. Since then there is not one, but “many decisions,” “successive determinations,” a “long series of authority,” “and a train of decisions,” all according, none opposing—not a dissent—so that there is no longer pretext for calling the principles in question. “*Res adjudicata stare decisis*, is a first principle in the administration of justice—it is one of the most sacred in law.” “Whatever the private opinion of a judge may be, it is safer to conform to established decisions, particularly in the House of Lords, but if not, the errors of great judges, acquiesced in for a series of years, ought to be adhered to. If mischief appear, the Legislature may interfere, but it is too much for the Courts. Upon the faith of an established rule and the acquiescence of judges and of the whole nation in it, property to the amount of millions may depend.”—Ram on Legal Judgments, 26-27.

“Every innovation occasions more harm and derangement of order, by its very novelty, than benefit by its actual utility. It is an established rule to abide by *former precedents, stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waiver with every new judge’s opinion, as also because the law in that case being solemnly declared and determined, what before was un-

certain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments, he being *sworn* to determine, not according to his own private judgment, but according to the known laws and customs of the lands—not delegated to pronounce a new law, but to maintain and expound the old one. *Jus dicere et non jus dare.*”—1 Blackstone Com., 69.

“Where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanted, or the principle or policy of the rule may be questioned. If there is a general hardship affecting a general class of cases, it is a consideration for the *Legislature, not for a Court of Justice*. If there is a particular hardship from the particular circumstances of the case, nothing can be more *dangerous* or *mischievous* than upon those particular circumstances to deviate from a general rule of law, for *misera est servitus ubi jus est vagum aut incertum.*”

“Obedience to law becomes a hardship when the law is unsettled or doubtful, which maxim applies with peculiar force to questions respecting real property, as family settlements, &c., and if in consequence of new lights occurring to new judges, all that which was supposed to be law by the wisdom of our ancestors were to be swept away at the time particular limitations are to take effect, mischievous would be the consequences to the public.”—Winehous vs. Rennel, 8 Bing., 557; 2 Vesey, Jr., 426–’7; Clark vs. Ludlum, 2 Bing, 180; 8th T. R., 504; Broom’s Legal Maxims, 61.

“The doctrine of the law then, is this: that precedent’s and rules must be followed unless flatly absurd or unjust; for thought their reason be not obvious at first view,

yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the King or other superior Lord. Now, this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions, and therefore can never be departed from by any modern judge without a breach of his oath and the law; for herein there is nothing repugnant to natural justice, though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody, and therefore though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is *not in his power to alter it.*" 1 Black. Com. 70.

The American Courts are by no means in conflict with the English on this subject.

"When a rule of property has been settled by judicial decisions, and may reasonably be supposed to have entered into the business transactions of the country, it is the duty of the Courts to adhere to it and leave the corrective to the Legislature." *Macvay v. Ijams*, 27 Ala. 238.

"The rule of *stare decisis* should not be departed from, except on the fullest conviction that the law has been settled wrong." 11 Texas, 449.

"A rule which has become settled law is binding on the Courts and should be followed." 25 Ala. 201.

"It is not so important that the law should be rightly settled as that it should remain stable after it is settled." 7 Monroe, 62-3.

"It is the duty of the judiciary, and they have the power to carry into effect the rights of parties according to ex-

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isting law, not to make a law for each case." 9 B. Monroe, 302.

The married woman's law does not affect the rights of the parties. The husband's right having been vested in 1840, it could not be divested by a law passed afterwards in 1845. This law was prospective, and not intended to embrace property which had already passed to the husband.—(See Thompson's Dig. 221.)

We are of the opinion then that the right of property in the slave Primus, the subject of this contest, was in Henry Mattair, and not in his wife, and that her claim to him is not sustained.

The judgment of the Circuit Court will be reversed and set aside, and the cause remanded to that Court with directions to enter judgment dismissing the claim of Mrs. Mattair, so as to leave the property subject to her husband's debts.

DuPONT, J., delivered the following dissenting opinion:

I do not concur in the judgment of the Court, and will now proceed to give my views upon the subject.

This was a suit arising out of a levy upon a slave, claimed by a *feme covert* as her separate property.

On the trial of the claim, before the Court, (a jury having been waived by consent of parties,) the plaintiff in execution produced the record of a judgment recovered against the husband of the claimant, in the Circuit Court of Columbia County, on the 20th day of December, 1855, together with the *fi. fa.* issued thereon, on the 31st day of January, 1856. He also proved that Henry Mattair, the defendant in execution and the husband of the claimant, had been in

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possession of the slave, from the year 1840 or 1841, down to the date of the levy.

The claimant adduced in evidence a deed of gift from her father, Henry Jones, dated the 3rd day of November, 1840, purporting to convey the said slave "to Caroline Mattair, wife of Henry Mattair, and the heirs of her body," with *habendum* to "the said Caroline Mattair and her immediate offspring—to *their own proper use and behoof forever.*" It further appeared in evidence that the deed produced on the trial was a copy of the original which had been properly recorded, but which, together with the record of the same had been destroyed in the fire which consumed the records and papers belonging to the clerk's office of Columbia county. This established copy was also recorded on the 2nd day of February, 1848. It was also in evidence that the debt upon which the judgment was founded, consisted of two promissory notes of the said defendant in execution—the one dated on the 29th of January, 1853, and the other on the 20th of March, 1854. It further appeared that at the time that these notes were given, the plaintiff in execution had full notice of the existence of the deed of gift, and that it had been recorded.

The Court gave judgment for the claimant, and from that judgment an appeal has been taken to this Court.

At the hearing before us, the counsel on both sides argued the cause, as though it were to be governed by the provisions of the statute known as "the married woman's law."

For the plaintiff in execution, it was insisted that the act referred to could not be made to operate retroactively, and the property having been acquired anterior to the passage of the act, it was not protected by its provisions, unless by the terms of the deed it had been secured to the wife as *separate property.*

For the complainant it was contended, that although the terms of the deed should not be found to convey a *separate estate* to the wife, yet, inasmuch as the possession of the husband was only the possession of the wife, and he had never exercised any act of ownership over the property inconsistent with the title of the wife, or attempted to deal with the same as his own; and, inasmuch as the credit extended to the husband transpired subsequent to the passage of the act, the provisions of the same operated to secure the property to the wife immediately from the date of enactment. I do not concur in this position; for, if the slave was not the *separate property* of the wife at the time of its acquisition and before the passage of the act, there is nothing in its provisions which will give it a retroactive operation, and even if there were, I doubt whether such a provision could be enforced without an infraction of the Constitution. My opinion is, that the case must be decided upon common law principles and without any reference to our statute. The simple question, then, presented for consideration is, did the terms of the deed secure to the wife a *separate estate* in the slave? The words of conveyance in this deed are, "to Caroline Mattair, wife of Henry Mattair, and the heirs of her body." These words, when applied to *personalty*, it is well settled, convey an *absolute* title to the grantee or first taker. The words of the *habendum* are, "to the said Caroline Mattair and her immediate offspring—to *thei own proper use and behoof forever*." It is upon the effect to be given to these latter words that this case is to be decided.

Upon proceeding in this investigation, it is painful to discover in the adjudicated cases the extraordinary conflict which prevails upon the subject. In the English cases, of equal character and authority, the same identical

words are interpreted to signify a diametrically opposite meaning. While one authority will hold the particular words to secure a separate estate to the wife, another will hold the same words to convey the estate to the husband.

It has been held that the words "for her own use and at her own disposal," created a separate estate for the wife, and barred the marital rights of the husband.—(Prichard vs. Ames, 1 Turn. & Russ., 222; Inglefield vs. Coghlan, 2 Coll., 247.) So also the words, "for her own use and benefit, independent of any other person."—(Margetts vs. Barrenger, 7 Sims., 482.) So too the words "for her livelihood," (Darly vs. Darly, 3 Atkins, 399,) or "that she should receive and enjoy the issue and profits."—(Tyrell vs. Hope, 2 Atkins, 558.) So where the direction is that "the interest and profits be paid to her, and the principal to her, or to her order, by note in writing under her hand;"—(Hulme vs. Terrant, 1 Bro. C. C., 16;) or "her receipt to be a sufficient discharge;"—Lee vs. Preaux, 3 Bro. C. C., 381;) or "to be delivered to her on demand." (Dixon vs. Olmins, 2 Cox, 411.)

On the other hand, it has been held that the words "to pay to her (a married woman) and her assigns," do not create a separate use for the wife.—(Dakins vs. Berrisford, 1 Ch. C., 194;) or where the gift is "to her use;"—(Jacobs vs. Amyatt, 1 Mad., 379;) or "to her own use and benefit;"—Johnes vs. Lockhart, cited 3 Bro. C. C., 383;) or "to her absolute use;"—(*ex parte* Abbott, 1 Deac., 338;) or when the payment is directed to be made "into her own proper hands, to and for her own use and benefit;"—(Tyler vs. Lake, 4 Sim., 144;) or "to her own proper use and benefit;"—(Blacklow vs. Laws, 2 Hare, 49;) or when the property is "to be under her sole control;"—(Massy vs. Parker, 2 My. & Keene, 674.) So also a bequest to a

woman and her assigns for her life, "for her and their own absolute use and benefit," has been held not to confer upon her a separate estate.

The foregoing citations are taken from the English reports, but, so far as I have had access to the American adjudications, I doubt if they will be found to afford any clearer light upon the subject. By a critical comparison of the words and their import which have been held to create a separate estate, and those which have been held not to do so, it will be seen that where there have been no terms which expressly excluded the marital rights of the husband, the decision in the particular case has been purely arbitrary, and not conformable in any well-defined rule of interpretation. This being the case, they afford but an uncertain light to guide the footsteps of the enquirer after truth, and we are remitted at least to the application of elementary principles, the only unerring guide to correct conclusions.

It is well settled, that no particular form of words is necessary in order to vest property in a married woman to her separate use; but the intention to give her such an interest, in opposition to the legal rights of her husband, must be clear and unequivocal. On the other hand, whenever it appears, either from the nature of the transaction, as in the instance of a settlement in the contemplation of marriage, where the husband is a party, or from the whole context of the instrument, limiting to the wife the property, that she was intended to have it to her sole use, that intention will be carried into effect by a court of equity.—2 Bright's Husband and Wife, 210; Leading Cases in Equity, 366.

It will thus be seen that the question is made to turn entirely into *intention*, and that where resort is to be had to implication, in order to ascertain that intention, the *na-*

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ture of the transaction, the *relation* of the parties and the *context* of the instrument, will exercise an important bearing upon the question. To my mind, these circumstances are well entitled to be received as *indicia* of intention, and are of greater weight than any loose form of words, which have no technical or fixed signification. With reference to the *nature* of the transaction, we can well conceive that where the deed is made to a *feme* in contemplation of an immediate marriage, the intention to secure to her a separate estate would be much more apparent than if it were made under ordinary circumstances. So, too, in respect to the *relation* of the parties: if the gift were from the husband, or he were a party to the deed, the presumption would be very strong that a separate estate were intended to be secured to the wife; for, to what purpose would he give the property, or become a party to the instrument, unless with the intention to bar his marital rights? So also with respect to the context, where different expressions occur in the deed, it will not be inferred that it was the intention of the donor to apply one and the same meaning to the different expressions. This is illustrated by the decision in the case of Kensington v. Holland (2 Mylne & Keene, 184). In that case there was a settlement upon Harriett Elizabeth O'Hara for, and during her life, "to and for her own sole and separate use, *independent of, and without being subject to the control, debts or engagements of her husband.*" In the same deed the remainder, after the expiration of the life estate, was settled upon Maria Theresa Holland, wife of Francis Holland, her executors, administrators and assigns, "*to and for her and their own use and benefit.*" A bill was filed by the assignee of the husband, to subject this remainder interest to the payment of his debts, and it was contended in behalf of the wife, that it was her separate estate under

the operation of the words, "to and for her and their own use and benefit." The Master of the Rolls decided against her claim, and in his opinion delivered in the case said: "The intention to give a separate estate must be clearly expressed. A gift to a wife for her own use and benefit, does not clearly express such an intention; *more especially* when it is considered, that in this case a trust for the separate use of a married woman is clearly expressed in the preceding part of the settlement. The court cannot infer that the same effect was intended to be given to different expressions."

The case of *Tyler v. Lake*, (4 Sim. 144, furnishes another authority for resorting to the context of the deed in order to determine the intention of the donor, where the expressions used in the instrument are ambiguous. By a deed declaring the trusts of the proceeds of real estates, the share of a married daughter of the grantor was directed "to be paid into her proper hands for her own use and benefit," and the same words were used in declaring the trusts of the shares of the grantor's sons. In commenting upon the case, the Vice Chancellor observed—"Supposing that it were ambiguous in this case, what is the meaning of the words relied on? The will itself has given us a power of restraining them; for it must be supposed that the settlor intended the same in one gift as in the other. Now in the gift to William Tyler, the settlor has used the same words as in the gift to Mrs. Anthony, but it cannot be supposed that she intended, by using these words, to give him any peculiar power, over the property which he was to take, except what is implied in the gift, and therefore I am bound to say that in the gift of Mrs. Anthony, those words are to be taken as mere words of gift, and not as conferring on her any particular power over the property."

These cases abundantly illustrate the correctness of my position, that where the words in the deed are ambiguous, resort may legitimately be had to the circumstances arising out of the nature of the transaction, the relation of the parties, and the context of the instrument, as *indicia* of the intention. In other words, that each case must furnish its own lights, and that we are to be guided to a conclusion rather by those lights than by the *arbitrary rulings* upon particular words, which have been made regardless of the surrounding circumstances.

Applying these views to the deed under consideration, and trying it by the tests above indicated, and I think there can be but little doubt as to the *intention* of the donor, when he used the words—"to their own proper use and behoof forever."

If we refer to the *nature of the transaction*, it will be found that this was a gift to a woman, who was at the time under the *disability of coverture*. If it were not the intention of the donor to give her a separate estate in the property, and to bar the marital rights of the husband, why was the deed made to her? We certainly cannot impute to the donor an ignorance of the fact, that, at common law, personal property given to the wife inures absolutely to the husband. There must have been some object contemplated in making the wife the donee in the deed. I do not insist that this circumstance taken alone, is sufficient to fix an intention to create a separate estate, but I enumerate it as only one of the *indicia* of such an intention.

And as to the *relation of the parties*:—This is not an ordinary purchase by the wife for value; but it is a voluntary gift from a parent to a married daughter, founded upon the consideration of "natural love and affection." The object doubtless, in making the deed to her, was to provide for the comfortable support and maintenance of

her and her children, and to guard against the casualties which might befall the husband's fortune. This view of the case is in accordance with the tender regard which every parent must be supposed to entertain for the welfare of his offspring. But neither do I consider this circumstance, isolated and alone, as sufficient to bar the marital rights of the husband. It is only mentioned as one of the guides to the intention.

Upon the next circumstance, however, to wit: *the context* of the deed, I do lay great stress, and I think it sufficiently potent of itself to fix the true signification and meaning of the words, "to their own proper use and behoof forever."

By reference to the deed it will be seen that the property was conveyned to her, "*and the heirs of her body.*"

Now there must have been some object contemplated by the donor in thus attempting to limit the property "to the heirs of her body." That object evidently was to give the wife a life estate, with remainder over to her children, and thus to bar the estate of her husband. It is true that from ignorance of a well established rule of law, that object of the donor was frustrated; but the failure to effectuate the object by no means lessens the potency of the words, when, considered as a means of interpreting the true meaning of the deed. In this connection, the words are to be considered, not with reference to their legal effect, but only as *indicia* of the intention. If there be any force in this view of the matter, then is it greatly strengthened by the fact, that the same effort to limit the estate is repeated in the *habendum* clause of the deed, where the words used are "to her and to her immediate offspring."

After the most anxious deliberation upon this subject, and with an earnest desire to concur with the views of my brethren if possible, I am constrained to hold that the deed

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Price and Wife vs. Sanchez.—Statement of Case.

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in question does secure to Mrs. Mattair a *seperate estate* in the slave levied upon, and that he is not subject to the debts of the husband. It therefore *dissent* from the judgment of reversal, pronounced by this court.

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JOHN W. PRICE & WIFE VS. VENANCIO SANCHEZ.

1. There must be a record or inventory of the property acquired by a married woman in the Clerk's office of the county in which it is situated, within six months after its acquisition, to protect it from the husband's debts.
2. In the trial of the right of property asserted by a married woman through a purchase, there must be proof that it was made with her separate funds, otherwise the presumption is that it was through means furnished by her husband.
3. In such trial, under the claim law, the sole issue it has to *the right of the claimant*, and he cannot object to either the judgment or execution under which the levy was made.
4. The Court will not reverse a case where the facts are not presented by a Bill of Exceptions, or there is an agreed case made in the Court below.

This case was decided at Jacksonville.

At June Term, 1854, of the Circuit Court for St. Johns county, Venancio Sanchez obtained a judgment by confession and agreement against Cornelius DuPont, for the sum of six hundred and twenty dollars. The said DuPont by his agreement waived all errors, and waived the filing of a præcipe or declaration, and the issue or service of summons. Execution was immediately issued on said judgment and was levied upon a negro boy named John, in the possession of John W. Price.

Sabina Price, wife of said John W. Price, formerly the wife of Cornelius DuPont, but from whom she has been divorced by decree rendered the first day of December, 1252, interposed a claim to the property under the statute of this State.

On the trial of the right of property, the claimant read in evidence a bill of sale from Manuel Crespo, the father of said Sabina Price, whilst she was the wife of said Cornelius DuPont, dated the 6th day of September, 1847, conveying the said negro boy John "to her and her executors, administrators and assigns, forever." This bill of sale was recorded on the 27th day of September, 1851.

The plaintiff in execution read in evidence a mortgage executed by Cornelius DuPont, dated 24th May, 1851, mortgaging said negro boy John to him, to secure the payment of a note of the same date for fifty dollars, together with any other advances the said Sanchez might thereafter make, and all costs and charges to which he might be put. This mortgage was recorded on the 15th day of July, 1851.

The plaintiff in execution also offered and read in evidence the record of a suit in Chancery instituted by him to foreclose said mortgage, which was afterwards dismissed.

The plaintiff in execution also read in evidence a note addressed to him from said Sabina, whilst she was the wife of said Cornelius DuPont, dated November 10th, 1851, in which she says: "I understand there is some difficulty about the debt of my husband to you. I am sorry to hear it; therefore if Mr. A. DuPont does not pay it, I will hold myself responsible for the debt by letting you have a mortgage on my black boy. I hope that you will be satisfied."

The record aforesaid of the suit in Chancery to foreclose

the mortgage, contains an account in favor of V. Sanchez against said Cornelius DuPont, for goods and family supplies furnished, beginning on the 17th day of May, 1851, and ending January, 1852, amounting to two hundred and twenty-one dollars. Of this amount sixty-eight dollars were contracted after the date of the note from the said claimant to the plaintiff in execution.

Afterwards, on the 29th of January, 1852, the said Sabina Price, then Sabina DuPont, writes to the plaintiff saying: "I have reconsidered the matter concerning that debt of Mr. DuPont's. I have concluded that I will not answer for the debt at all, for I stand in need of all the money that I can get. Therefore I must retract from my note I wrote you concerning the debt, and I hope you will excuse me as I did it hastily, without forethought."

In her answer to the bill in Chancery aforesaid, the said Sabina alleges that "she was induced to write the note of the tenth November, 1851, by her husband, who represented to her that unless she did it he would be put in jail, and that her husband deceived her to induce her to write the paper."

Manuel Crespo, the father of the claimant, was called as a witness for the claimant, who testified that he bought the negro boy in Charleston—that he made the bill of sale of said negro boy to said Sabina, who was then the wife of Cornelius DuPont—that she had three children by said DuPont—that they lived together until some time in the summer of 1851, when they separated—that Mrs. DuPont went to live in Jacksonville in October, 1851. The possession of the boy he says was with Mrs. Price while she was Mrs. DuPont, and since.

On cross examination, he declared that he and DuPont were for a long time in business together—that in said business he became and was indebted to said DuPont—

that in settlement of accounts he at the request of said DuPont deeded by said bill of sale this negro boy in dispute and a woman for said debt due said DuPont, and in payment of said debt.

The Court below gave judgment for the plaintiff in execution, and the claimant appealed.

*J. P. Sanderson* for appellants.

*G. R. Fairbanks* for appellee.

BALTZELL, C. J., delivered the opinion of the court.

This was a claim on the part of a married lady, Mrs. Price, asserting right to a negro boy John, levied upon to pay a judgment against her former husband, Cornelius DuPont. Her father, Manuel Crespo, in the year 1847, conveyed this boy John to his daughter by bill of sale regularly executed. It was not recorded until the 27th day of September, 1851, and this constitutes the principal difficulty and objection to its validity, the law of the State, enacted to secure certain rights to women, providing in its second section that "married women may hereafter become seized or possessed of real or personal property, during coverture, by request, devise, gift, purchase or distribution, subject to the restrictions, limitations and provisions contained in the foregoing section," which are "that the title to the same shall continue separate and independent and beyond the control of her husband, and shall not be taken in execution for his debts, provided, however, that the property of the female shall remain in the care and management of the husband."—Pamphlet Laws '45, p. 24; Thompson, 221.

The seventh section provides, that "all the property, real or personal, which shall belong to the wife at the time of her marriage or which she may acquire in any of the modes

hereinbefore mentioned, shall be inventoried and recorded in the County Clerk's office of the county in which such property is situated, within six months after such marriage, or after said property shall be acquired by her, at the *peril* of becoming liable for her husband's debts, as if this act had not been passed."—*Ibid.* p. 25; Thompson, 221.

There is no ambiguity, that we can discover, in this provision. It is a clear declaration, that in case of a failure to record, the property shall be liable to the husband's debts as if the act had not been passed. What other result is to follow?—to what is the property to become liable?—what peril to be subject to, if not this? The property in contest (the title to or a description of it) in this case, the boy John not having been inventoried and recorded within the time prescribed, but some four years after the date of the deed, it follows that he is liable for the husband's debts, and that the wife may not have the benefit of this law; it is indeed to her as if it "had not been passed."

There is no proof in the record that the creditor seeking to make the property by his execution, and who is also a mortgagee of the same property, ever had notice of this bill of sale at the time of the creation of his debt or mortgage, so that the effect of notice of the title of the *feme* is not presented nor adjudicated here.

There may be hardships in this, as in other cases, from non-compliance with its provisions, but where is there exemption in the instance of any law? The same difficulty attends the provisions for the recording of deeds to land. There a purchaser who has paid for land and innocently failed to have his deed recorded, may lose it by its being sold a second time, or from its being subject to the debts of his vendor, yet the wisdom and propriety of such a provision are no longer disputed. From the relation existing between husband and wife, giving rise to the presumption

of ownership by him, persons might be tempted to buy or give credit on the faith of such possession. Frauds might be perpetrated through such means. Hence the true state of the title is appropriately required to be avowed and placed upon the record, so as to be accessible to the entire community. The title or right of the *feme* is made to depend upon this record and open avowal, and not upon the knowledge of intimate friends or conjecture or mere rumor. To leave such important rights and interests to the risk of the latter would have been unwise and improvident, so that we perceive neither harshness nor severity in the provision.

In other respects, there is a difficulty attending the claim of this *feme*. Her father deposes, "that the husband DuPont and himself were in business together, and he became indebted to him, and in settlement of accounts, he, at the request of DuPont, deeded this boy in dispute and another *for said debt* and in payment of it to said DuPont."

This presents a state of facts so nearly resembling that of *Mercer vs. Hooker*, decided by this court, as scarcely to be distinguishable. . In 1850, Hendrick purchased a bay horse of one Hagler, who, at the request of Hendrick, executed a bill of sale to the wife of the latter. The court say, "to establish the title originally in Mrs. Hendrick, it was not only necessary to prove that the purchase was made for her and *with her money*, but that the property was inventoried and recorded in the clerk's office of the Circuit (County) Court within six months after said property was acquired by her."—*Mercer vs. Hooker*, 5 Fla., 279.

In the case of *Craig vs. Gamble*, this decision was reaffirmed.—*Ibid.*, 437.

"Elsewhere it is held, under a like law, that 'mere evi-

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Price and Wife vs. Sanchez.—Opinion of Court.

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dence that she, the *feme*, purchased the property, is not sufficient to give her title. It must be satisfactorily shown that it was paid for with her own separate funds. In the absence of such proof, the presumption is violent that the husband furnished the means of payment."—18 Pennsylvania, 363; 21 do., 349.

A letter addressed by the *feme* to the execution creditor, during the time of the creation of the mortgage debt, in which she says, "she understands there is some difficulty about the debt of her husband, and she is sorry for it, therefore, if her husband does not pay it, she will hold herself responsible for the debt by letting him have a mortgage on her black boy, and she hopes he will rest satisfied," relieves the case of any high moral regard. The account was for goods, provisions, &c., furnished the family, and articles of this kind to the amount of \$68 were bought after the date of this letter. Certainly as to them she could present no proper resistance. It is true she writes afterwards that "she has reconsidered the matter, and concluded that she will not answer for the debt at all, as she stands in need of all the money she can get, therefore she retracts from her note, as she did it hastily, without forethought," and alleges afterwards in her answer to a bill in chancery, that "she was induced to write said paper by her husband, who represented to her that unless she did it he would be put in jail, and that her husband deceived her to induce her to write the paper." Her second note probably gives the true account in saying that "she stood in need of all the money she can get." Certainly there is no evidence as to undue influence on the part of her husband.

We concur fully with the court below in the opinion that the claimant could not object to defects or irregularities in the judgment or execution. This may only be done

as to the former by the defendant on an appeal or writ of error, or in a direct motion to set aside the latter. The statute permits a claim upon oath of a party that *the property belongs to him*," and the jury are to be sworn "to try the *right of property*"—that is whether or not the property belongs to claimant. This is the sole and simple issue, and the proof lies upon claimant. If he succeeds in showing his right, the property is released from the levy—if he fails, the execution proceeds without further obstruction from him. The proceeding is a substitute for the action of trespass or trover at common law, and differs only in its being summary and not having formal pleadings. Without this statute, a party whose property might be levied upon, would be driven to his action at law against the officer or plaintiff, the execution in the meantime having progressed to completion.

It is with regret we again have to remark upon the defective state of this record in having no bill of exceptions. As the judgment must be affirmed for want of error in this respect in any event, we have consented to treat the case as presented by counsel, an earnest request having been made that our views should be given as to the law. Had the case presented matter of error, we should not have felt justified in reversing it, even under this agreement of the parties.

Let the Judgment of the Circuit Court be affirmed with costs.

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Linton vs. Walker et al.—Statement of Case.

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THOMAS J. LINTON, APPELLANT, *vs.* HAMILTON K., MARY  
H. AND MINOR W. WALKER, APPELLEES.

1. A payment to a father as natural guardian for a child, is not valid as a defence to an action for recovery of the hires of negroes belonging to the child.
2. Nor will a plea be good as a defence that the father, being for a long time in possession of the child's negroes, hired them to the defendant and had received the payment therefor.
3. An action for assumpsit is not maintainable by a ward against his guardian, or quasi guardian, the parent. The remedy is by action of account or bill in equity, in which the equities between the parties may be adjusted and rightfully settled.

This case was decided at Tallahassee.

On the 2d day of April, 1856, the appellees, the children of Minor Walker, who are minors, instituted an action of assumpsit in Jefferson Circuit Court against the appellant, to recover the hires of fifteen negro slaves for five years, from 1850 to 1855.

The appellant pleaded:

1st. *Non assumpsit.*

2d. Payment to the father of the plaintiffs, as natural guardian, of a large sum in full satisfaction.

The plaintiffs joined issue on the first and demurred to the second pleaded, which demurrer was sustained by the court.

Defendant then pleaded payment generally and also specially:

"That one Minor Walker, who was and had for a long time before been in possession of the said slaves, in the declaration mentioned, claiming and exercising ownership thereof, and without any notice or knowledge by this defendant that the plaintiffs had or claimed any title to said

negroes, did, on the first day of January, A. D., 1850, hire the said negro slaves in the declaration mentioned to this defendant for five years from the first day of January, A. D., 1850, for the sum of six thousand dollars, in equal annual installments, falling due and payable on the first day of January in the years 1851, 1852, 1853, 1854 and 1855 respectively, each installment being for the sum of twelve hundred dollars. And defendant avers and in fact saith, that before the institution of this suit, and before he had any notice or knowledge that the said plaintiffs had or claimed title to said slaves, and before they made any claim to said slaves in said declaration mentioned, he, the said defendant, fully paid to the said Minor Walker the said sum of six thousand dollars, for the hire of said slaves in manner aforesaid, according to the said agreement of hiring."

Plaintiffs joined issue to the plea of payment and demurred to the special plea, alleging as grounds of demurrer:

1st. That the plea charges payment to Minor Walker and not to plaintiffs.

2nd. It does not allege that the said Walker was authorized to grant acquittances and discharges, and that he did acquit and discharge the defendant.

3rd. That the plea is no answer to the action, is double, is not triable, is irregular and insufficient.

The court below sustained the demurrer and defendant excepted.

On the trial the plaintiffs offered and read in evidence the record of the will of Jaqueline Peterson, decd., late of Hancock county, Georgia, admitted to probate 4th May, 1829, in which he lends to his daughter; Martha Peterson, who afterwards intermarried with Minor Walker, certain

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property, "until she may marry and have a lawful child, and in that event of her having and leaving at her death a child or children, he gives and bequeathes unto such child or children the same property absolutely."

Plaintiffs also offered and read in evidence a receipt of Minor Walker, then the husband of Martha Peterson, dated 9th February, 1837, in which he acknowledges to have received from the administrator of Jaqueline Peterson certain named negroes, which he declares were all that he was entitled to under the will of J. Peterson.

Henry L. Taylor, a witness for plaintiffs, testified that he knew Minor Walker in 1832—that said Walker married in 1833 Martha Peterson, daughter of Jaqueline Peterson—that he had no negroes of his own at that time—that he knew several of the negroes mentioned in the declaration, and knew that negroes by the names of the others were left by the will of Jaqueline Peterson to his daughter Martha. Has seen the negroes within a day or two, and is satisfied from their ages, family resemblances, &c., that they are the same negroes left by said will. Has seen the negroes named in the possession of Minor Walker in Hancock county.

Charles G. English, another witness for plaintiffs, testified that previously to first of January, 1852, he held repeated conversations with H. L. Linton and Thomas J. Linton, respecting the mortgage of Minor Walker to the Union Bank. By one or the other of them, and his impression was by both, he was informed that there was a report that the slaves mortgaged by said Walker to the Bank were the property of his children. Neither of them told witness such was the case as of his own knowledge, and up to that time witness had never heard the report that they were the property of Walker's children from any other source.



William Butler, another witness for the plaintiffs, testified that Linton, at the time he was making a bargain with Minor Walker for the hire of certain negroes in controversy, told him, witness, that the negroes he was about to hire did not belong to Minor Walker, but to his children. This was some time in 1849, and only a short time before he hired the negroes. Linton was speaking at the time of the good bargain he had made with Walker, and the cheapness of the price he was to pay for the hires. The negroes were in the possession of Minor Walker at the time.

William Denham, another witness for the plaintiffs, testified that in the year 185-, Linton told him that he wanted to get Minor Walker entirely out of the Union Bank, and that the Bank would not release his land unless the whole debt was paid, because they believed their mortgage on the Walker negroes were not worth anything; that the negroes referred to are the same negroes hired by Thomas J. Linton from Minor Walker—that Walker exercised act of ownership over the negroes until Dr. Palmer took out letters of guardianship of the children of said Walker—that about the year 1843, Mrs. Byrd proposed to purchase a negro from Walker, who told her she had better not, for his title would not be good, but that he, witness, did not believe what Walker said, as he, witness, thought Walker was only trying to put Mrs. Byrd off in the payment of what he was indebted to her; that Walker hired out said negroes to W. N. Taylor for the year 1855, and collected the hire for the same.

It was admitted that Mrs. Walker, the mother of the plaintiffs, had died before the year 1850.

The defendant, to sustain the issue on his part, offered and read in evidence an indenture, entered into between Minor Walker and Thomas J. Linton, dated the first day of January, 1850, and recorded 2d April, 1850, whereby

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said Walker conveyed to said Linton certain lands mortgaged by said Walker to the Union Bank of Florida, for the consideration of six thousand five hundred dollars, a sufficient amount of which was to be applied by said Linton towards the payment of the debt to the Bank and the removing the incumbrance, and the balance to be paid to said Walker. The said indenture also contained the following agreement of hiring of the negro slaves named in the declaration, viz:

“This indenture also witnesseth, that the said party of the first part hath hired and delivered, and doth by these presents hire and deliver to the party of the second part, fifteen negro slaves of the names following, to-wit: Abednego, Meshach, Allen, Monroe, Starling, Drew, Major, Winney, Caroline, Nancy, Cheney, Mary, and Silla: To have, hold, use and enjoy to him, his executors and administrators, for the period of five years next ensuing the date hereof; and in consideration of said hiring and delivery, the said party of the second part agrees and hereby covenants to pay to said party of the first part the sum of six thousand dollars, in five equal annual instalments, falling due and payable on the first day of January in the years 1851, 1852, 1853, 1854 and 1855 respectively, each instalment being for the sum of twelve hundred dollars. And the said party of the second part further covenants to treat said slaves kindly and to supply them with the usual amount of food and clothing, and on the first day of January, 1855, *to return such of them as shall be alive, with the increase of the females, to the said party of the first part.*”

The defendant also read in evidence a bill in chancery, filed by said Linton after the termination of the hiring, against Minor Walker and Denham & Palmer, and the answers thereto, growing out of the said agreement of

hiring, alleging a settlement and payment of all the instalments for the hires of said negroes, except the last, which had been transfered to Denham & Palmer, and as to this last claiming a set-off and payment, and that he should be credited therewith against the last instalment in the hands of Denham & Palmer.

The answer of Denham & Palmer admits that said Minor Walker, at the time of filing the same in November, 1855, had control of the negroes formerly hired to Linton, and that he had hired them out for that year. They also admit that the note for the last instalment of the hiring was transferred to them by Minor Walker.

Minor Walker, in his answer to said bill of complaint, admits the execution of said indenture, and that he delivered to said Linton the negroes hired by him, and also admits the settlement by Linton of all the instalments for the hiring except the last one, which fell due in January, 1855.

The defendant also read in evidence the record of a mortgage executed by Minor Walker to the Union Bank, dated 10th May, 1838, mortgaging the negroes hired to Linton and named in the declaration.

The defendant offered to read in evidence the statement of C. G. Fife, taken by consent, to be used in evidence, if admissible, in which said Fife declares that Minor Walker, in 1850, desiring to go in business with witness, stated that he had hired *his* negroes to Linton, and that from the hires he could raise the money to commence with.

In 1855 witness was employed by Linton to collect two judgments he held against Walker. Witness stated that he thought it a poor chance. Linton urged a levy on Walker's negroes in Jefferson county. Witness told him that he had heard the rumor that the negroes were the property of Walker's children. Linton replied he did not

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believe it, nor did he believe it until an authenticated copy of the will and proceedings of the Court from Georgia was obtained by the claimant of the property levied on. This, witness thinks, was in the year 1856; and upon witness exhibiting this copy of the will, Linton manifested surprise and said he never believed it before.

The court below ruled out the statement of said Fife as irrelevant, and defendant excepted.

Under an agreement to waive a jury, the court below gave judgment for the plaintiffs; with a writ of enquiry to assess the damages, and defendant appealed.

*Archer and Papy* for appellant.

*W. S. Dilworth & B. C. Pope* for appellees.

BALTZELL, C. J.

This is a suit of the infant children and heirs of the late Mrs. Minor Walker, claiming of the appellant, Linton, the hire of fifteen slaves which they own through a legacy from their grandfather, Jaqueline Peterson, who, in the year 1824, made his will in Hancock, Georgia, giving this and other property to his daughter Martha, their mother, and after her death to her children. Minor Walker intermarried with her, and by this means became possessed in 1837 of her property. On the first of January, 1850, he hired the negroes to Linton for a term of five years, and has received all, or the larger portion of the price agreed to be paid. Mrs. Walker died previously to the year 1850. The right of the children to the negroes is not contested. The present suit is through their guardian to obtain the amount due for the hire, insisting that the payment to their father was not valid.

Two pleas filed in the court below, and adjudged insuffi-

cient, present the question raised for consideration in this Court.

The first sets up the payment to the father of the plaintiffs, as their natural guardian, of a large sum in full discharge of this hiring, and that plaintiffs, by their natural guardian, received said sum in full satisfaction, &c.

It is too well settled to admit of question that such a payment is not an acquittance nor satisfaction.

The true doctrine on this subject will be found in the recent editions of Blackstone to this effect: "Guardianship by nature confers no right to intermeddle with the property of the infant, but is a mere personal right to the custody of the *person* of his heir."—Black, Com. p. 460, n. 1.

And so in the American elementary works—2 Kent. Com. 217; 1 Bouv. Inst. 139. The American Courts hold in like manner, though in language somewhat differing, "A guardian by nature has no control over the property, real or personal, of his child; he is not entitled to the personal estate of his ward." "A payment to him on account of the child is no payment."—1 John. Chy. 3; 7 Cowen, 38; 7 Wend. 354; 15 Wend. 631; 2 Mass. 55; 3 Pick. 213; 2 Hill, (S. Car.) 288; 5 Porter, (Ala.) 385; Walker, (Miss.) 46; 9 Wend. 504; 9 B. Mon. 324, (Ky.) The defence set up in this plea then is clearly untenable.

The other plea abandons the ground of guardianship of the father and all right proceeding from that relation, alleging "that Minor Walker, *for a long time, having been in possession* of the said negroes, hired them to defendant—that defendant had no notice of plaintiffs' right, and that he has paid and satisfied Walker." Very clearly this presents no defence; it alleges no right but that of past possession, which of itself gives none. For if it had, the possession for one year, by hiring, might put up claim for the second year on this account. In the very case before us,

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Minor Walker had right, through his intermarriage and the life tenancy of his wife, to the negroes, up to 1850, but he had no greater right after that time than his children had to the period preceding her death, before their right accrued. Nor does the want of notice strengthen the claim of Linton to the negroes, or exempt him from payment to the true owner. The children are as much owners without such knowledge as with it. No proposition is clearer than that the owner alone has the right to hire his property, nor is he less owner that his rights are unknown. As far as the true owner is concerned, it is the *risk* of the hirer that he deals with one having no right nor authority. Bargaining with such a one; the hirer gets what such person could assign or convey to him, and if the latter had no interest nor authority he could convey none. There is just as much reason for holding that Linton could hold the negroes against a demand of the children, properly made, as for claiming the payment made by him as a lawful acquittance. The defence under this plea also we regard as untenable.

Whilst the merits are so clearly with plaintiffs, an objection yet remains of no slight delicacy and importance. Defendant insists that a Court of Chancery is the proper forum for the adjudication of the case, and that an action of assumpsit, the remedy adopted here, is not maintainable. The plaintiff's demurrer to defendant's pleas raises this question, it being an established rule that such pleading "lays open to the court, not only the pleading demurred to, but the entire record, so that the court will give judgment against the party committing the first fault in substance; and if the declaration be bad, there shall be judgment against the plaintiffs, though the bar be also insufficient." Arch. Ple. & Ey. 314-15; 1 Chitty, 647; 1 Florida, 132.

That a suit in Chancery was the appropriate remedy, we think admits not of a doubt. Blackstone in his 3rd vol., speaking of the remedies for wrongs in this relation, says: "A more speedy and summary method of redressing all complaints relating to guardians and wards, hath of late obtained by an application to a Court of Chancery, which is the supreme guardian, and has the superintendent jurisdiction of all the infants of the Kingdom."—3 Black. 141-2.

"A Court of Chancery will exercise a vigilant care over guardians in their management of the property of the infant. It will carry its aid and protection in favor of infants to reach other persons than those who are guardians, strictly appointed; for, if a man intrudes upon the estate of an infant and takes the profits thereof, he will be treated as a guardian and held responsible therefor to the infant in a Court of Equity."—2 Story's Equity, 585; Morgan vs. Morgan, Atk., 489.

The American reports are full to the same effect: "The father receiving property of an infant, will be held liable to the same extent as if regularly appointed."—4 Paige, 64.

"A person acting as guardian is subject to the responsibility of guardian." This was the case of an uncle.—5 B. Monroe, 362; 1 Ib., 183.

"The allowance to guardians, and those who act as *quasi* guardians, for support, maintenance and education of children, is limited to the amount of income from rent and hires of the estate, except under peculiar circumstances." Jackson vs. Jackson, 1 Grat., 143.

"Where a mother, on the death of her husband, took possession of the estate, and managed it, and maintained the children out of the income, she was allowed for their

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past and present maintenance.”—Wilkes vs. Rogers, 6 John., 566.

“A parent will not be compelled to account for hire of a slave held by him in indigent circumstances, when the services of the slave were in support of the ward.”—1 B. Mon., 187.

“Where the father or mother is in distress or narrow circumstances, a maintenance or provision will be allowed out of the estate of their child.”—2 Story’s Equity, 584.

See also authorities collected in Osborne vs. VanHorn, 2 Florida Rep., 362—a case very near, in its leading facts like that decided by the Supreme Court of New York in the days of Kent and Spencer, being the case quoted above as 6. John., 566.

It will be thus seen that chancery, whilst admitting the rule of the invalidity of a payment to a parent as natural guardian to its full extent, yet moderates its sternness and severity in deference to natural ties and the dictates of a generous nature, by allowing to parents, other relatives, and even to strangers, payments or disbursements made in good faith to and for the child—in some instances even giving a maintenance from the child’s fortunes when the parent is in reduced circumstances.

Whilst, then, a bill in equity is the appropriate remedy, the question remains whether an action of assumpsit may not also be maintained.

Account was the old remedy, but has become obsolete. It lay against a *quasi* guardian, as a parent, who receives the profits of his child’s land, and also in like manner against a stranger as guardian.—1 Com. Dig., Acct., A. 2, page 188. He shall not be charged as receiver, for a receiver shall not be allowed his expenses as a guardian shall.—Ibid.; Co. Litt., 172a.

“In account, the judgment against defendant was *quod*

*computet*, that he make his account, and auditors were assigned, usually two officers of the Court who were to assign a day, and defendant was to appear from day to day till the account was finished. The defendant could plead that he has expended for plaintiff's maintenance—that he had lost by inevitable accident, and he shall be allowed all reasonable accounts and expenses in all things." 1 Com. Dig., Acct., E. 7, 8, 11, 12; 1 Arch. *Nisi Prius*, 198-199.

It is insisted by plaintiffs, that assumpsit is the substitute for the action of account in the present case. For this we have a reference to Archbold's *Nisi Prius*, yet it does not bear out the position. The authority is, that "where a man receives several sums of money on account of another, he may bring assumpsit or debt, or he may have an action of account." Under the head of action of account, the same learned author says: "If a man receive money belonging to another and render an account of it, the remedy for the balance due by him is by assumpsit or debt. . . But if he refuse to render an account of the money received by him, and the owner have no evidence of the receipt, the only mode of compelling him in a court of law to render an account and pay over the balance, is by action of account. The action must be brought against the defendant as receiver or as guardian."—1 Arch., 196.

In all cases where evidence can be given of the receipt of money, assumpsit or debt is substituted; and in all cases where assumpsit or debt will not lie, it is usual now, instead of bringing an action of account, to file a bill for an account in a court of equity. This is perhaps to be regretted, for in many cases the action would be as satisfactory a remedy, and much more expeditious and less expensive.—1 Arch. *Nisi Prius*, 197.

The action of assumpsit is so unsuited to cases of this

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nature, as to require a very strong authority to induce the belief that it is applicable to them. In the trial by the action of account, the judgment is that defendant makes an account as guardian. There is none such in *assumpsit*; and the matters depending between the parties are obviously of a nature to require an account, being such as is usually settled by a Judge of Probate for sums paid for boarding, schooling, clothing, physician's bills, hire of negroes, paying taxes, &c., all requiring nice and careful calculation and the patience of days to comprehend and adjust with reasonable certainty. In this case, the account of Linton may be of this very character, ranging over a period of five years. If he is entitled to such payments and credits as are usually allowed, then there should be such an account. To submit a case of such character, with its numerous items, to a jury, with a reasonable hope of attaining a certain and just result, would scarcely be wise or proper. Hence it is we see the provision for the action of account with auditors, and a court of chancery with its master. We perceive, also, that the action of *assumpsit* does not lie and may not be maintained by a ward against a guardian.—19 John., 304.

It is not a little remarkable in this connection that the authorities declaring the rights of infants associate the remedy thus: "*Account* lies against a stranger as guardian, who enters and receives the profits."—1 Com. Dig., 187. "Such persons will be held responsible therefor to the infant *in a court of equity*."—See cases quoted above. Now, why this declaration, if the right and the remedy existed as in other cases? We will add, that in all our investigations, we have not been able to find the instance of the action of *assumpsit* applied to the circumstances of the present case.

It is urged again by plaintiffs, that the defendant being

a trespasser, they may waive the wrong and sue in assumpsit. The authorities cited have been examined with every care, but they fail to satisfy us. We are not disposed to deny that they may apply to cases in which the parties labor under no disability. We are relieved from a minute examination of these by the very conclusive authority of the case of *Sherman vs. Ballou*, in the Supreme Court of New York. There the effort was to get a set-off for rents received and due to an infant. The objection to it was that it was not matter of set-off, the parties not being suable in assumpsit. The Court say, "the plaintiff never had any authority to dispose of the defendant's property, nor as his guardian nor agent of his guardian, to receive the rents and profits, the letters of guardianship being void and his interference tortuous. If a man who has no title to be guardian enters as guardian into the lands of an infant, it is at the election of the infant to make him a disseisor, or *else to dissemble the wrong and call him to account as guardian.*"—Bac. Ab., Guard., 1.

"If the defendant chose to waive the tort, then the plaintiff *must be called to account as guardian, and the remedy is in chancery*, or by action in account."—1 Mad., 262; 19 John., 304; *Sherman vs. Ballou*, 8 Cowan, 307.

So we think here that the plaintiffs' remedy is by bill in equity, and that the action of assumpsit is not maintainable. In coming to this conclusion, it is gratifying to find that the decision will be conducive to right and justice in the end.

It is very clear from the evidence that the defendant is entitled to credits, and these should be ascertained before a judgment is pronounced against him. The counsel for plaintiffs proffered, on the mention of these, to allow whatever was rightful and proper, but it does not comport with either justice or propriety to leave the rights of contest-

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ing parties dependent upon the liberality of an adversary. Far better the remedy in every instance which shall adjust and determine all the matters in contest between the parties, and leave none of them to future decision or controversy. The judgment will then be, as it ought to be, for the true amount due.

The judgment of the Court before will be reversed and set aside, and the cause remanded, with directions to that Court to enter judgment on the demurrer for want of the proper action being instituted by plaintiffs, the remedy of the plaintiffs being a court of chancery, to which they are referred.

DUPONT, J.

I concur in the judgment of reversal pronounced in this case, and it having been decided that the plaintiffs are not properly in Court, I think that there is an impropriety in passing upon the merits of the controversy. I desire, therefore, to have it noted that I am not committed to the views expressed by the C. J. upon this point, and shall reserve my opinion upon the merits of the case until the parties may come properly before us.

PEARSON, J., dissenting:

I might perhaps concur with the Court in all the points laid down in the syllabus to this cause, could I under the evidence adduced consider this an action brought by wards against a guardian, or *quasi* guardian. But I cannot look upon the appellant (Linton) in any other light than as a *wrong-doer*—that is to say charged with keeping, using and working, for his own benefit, negroes of another, without any lawful authority and in no way claiming or pretending to act for said minors or for their benefit.

If it be good law, that said Minor Walker, as guardian

by nature, had no control over the property real or personal of his said children, and the payment to him on account of the children was no payment, and that the said Linton could not hold the negroes against a demand of the children properly made, then he has been declared a wrongdoer by this Court in wrongfully applying the labor and work of said negroes to his own use.

A parent cannot sue for the property of the child. Yet there cannot be a doubt but that these children, after the death of their mother, at any time, while these negroes were in the possession of said Linton, could have brought (after demand and refusal,) trover for them, or could have brought replevin, alleging an unlawful detainer, and recover under our statute damages for their detention.

If then the plaintiffs could have, while the negroes were in possession of said Linton, waived their action of trover or replevin, and treated the said Linton as their agent, in receiving hires of said negroes, and brought action of assumpsit, why not now look upon him in the same way, and recover the hires in an action for money had and received, or in an action for the work and labor of said slaves? *Tugman vs. Hopkins, Manning & Graves*, p. 389.

The principles on which the action for money had and received may be maintained, are these :

1st. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund.

2nd. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over, has received notice of the plaintiff's claim and a warning not to part with the fund.

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3d. Where there exists a privity between the plaintiff and the defendant.

If the declaration in this cause contained a count for money had and received, there would be no difficulty under the evidence in bringing the claim of the plaintiffs within some or all of the above principles.

The question then is, whether *assumpsit* for work and labor of these negroes wrongfully held can be maintained?

In Greenleaf on Evidence, vol. 2, § 108, it is laid down: "If one commit a tort on the goods of another, by which he gains a pecuniary benefit, as if he wrongfully takes the goods and sells them, or *otherwise applies them to his own use*, the owner may waive the tort, and charge him in *assumpsit* on the common counts."

This rule has been further applied so as to entitle the plaintiff to recover for the *beneficial* use of the things taken.—1 N. Hamp. 451; 5 Greenleaf, 323; 2 Gill & Johnson, 326.

A master may sue a person who has enticed away or harbored his apprentices or slaves, in *assumpsit*, for the work and labor of said apprentices or slaves. 1 Chitty on Pleading, 94, 103; Lightly v. Clouston, 1 Taunton, 112; Foster v. Stewart, 3 M. & S. 191; Miller v. Miller, 7 Pick. 133.

That the privity between the parties is established seems clear, else payment to said Walker (the father,) would have been good.

Where the defendant, as in this case, retains in his possession slaves belonging to another, for whose use, hires, and labor he ought in justice to pay, and it appears that they did work for him, the law as I understand it presumes he promised to do so. Cook v. Husted, 12 Johnson, 188.

Again, why have not the plaintiffs a right to accept the

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promise for hire made with their said father, as having been made for their benefit particularly when it appears that Mr. Linton, the appellant, knew the negroes were the property of the said plaintiffs?

If there is no privity between the parties in this suit, then an action of account will not be maintained, because privity is essential to such an action. 2 Greenleaf on Evidence, § 35. Bill in equity will not lie for torts unless under peculiar circumstances.

Suppose there is beyond a doubt a jurisdiction in the Court of Chancery in this cause, it does not follow that a court of law has not also jurisdiction.

Had the appellant filed a bill in Chancery, or were he now to file one, claiming and setting forth that the money arising from the hires of these negroes, in whole or in part, were and had been appropriated by the father for the benefit of these children, and asking to be subrogated to that claim of set-off, I have no doubt a Court of Chancery would grant the relief prayed. It certainly would present a strong case for such a remedy.

For these reasons, I differ with the Court in their judgment of reversal.

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JOHN MILTON, APPELLANT, VS. DAVID BLACKSHEAR, APPELLEE.

1. It is not every irrelevant instruction that will afford a ground for error. The instruction, to be erroneous, must be not only irrelevant, but likely to mislead the jury in the formation of their verdict.

2. Where the demand sued for is a *debt ex nomine*, in contradistinction to

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*unliquidated damages*, interest is allowable thereon from the time when the same becomes legally due and payable; and when no such time is ascertainable, then interest is allowable only from the date of an actual demand of payment, or of the commencement of the suit.

2. The Supreme Court will not remand a cause, simply on the ground of a *slight excess* in the amount of the verdict.
4. It is a well settled rule, in reference to the granting of new trials in the courts of common law, that the party applying on the ground of *newly discovered evidence*, must make his vigilance apparent, for if it is left even-doubtful that he knew of the evidence, or that he might, but for negligence, have known and produced it, he will not succeed in his application.
5. On a motion for a new trial on the ground of newly discovered evidence, if the evidence proposed to be obtained be merely *cumulative*, or in corroboration of testimony to a point presented at the trial, the motion will not be granted.

This case was decided at Mariana.

On the 21st day of April, 1857, the appellee instituted in the Circuit Court of Jackson county an action of *assumpsit* against the appellant, to recover the sum of one hundred and sixty-three 22-100 dollars, claimed to be due for lumber sold and delivered at different times in the year 1855.

The declaration contains a single count for goods sold and delivered, and the appellant pleaded *non assumpsit*, upon which issue was joined.

On the trial, Charles Graves was sworn as a witness for the plaintiff, who testified that he was a miller, who had charge of plaintiff's mills; that the lumber charged in the bill of particulars was sold and delivered, and that the custom of the mill was, when there was no other contract, the price of lumber was eight dollars per thousand, cash, or when called for during the year, or eight dollars if paid by the end of the year, otherwise ten dollars per thousand; that defendant said he would pay cash; that defendant called for his account, and was told by witness that the plaintiff made out the accounts from the book. Witness

told defendant, that if he, the defendant, paid the money by Christmas, it would do as a cash sale.

Charles Hartsfield, a witness for defendant, testified that he as the agent of the plaintiff, informed the defendant, in January, that he had the books in which the lumber accounts were kept to collect the amounts due; that he was the agent of the plaintiff; that he did not present the account to defendant; that the defendant informed him, that if the witness would bring him the account at any time within three days that defendant would pay the amount, which was eight dollars per thousand; that witness did not know that the account ever had been presented afterwards; that up to that time the account had not been made out from the books.

Martin Embry, another witness for the defendant, testified that he was miller for plaintiff in the year 1856; that he presented the defendant the account sued on for this lumber some time in 1856 at ten dollars per thousand; that defendant refused to pay it, but tendered witness the money at eight dollars per thousand. He also presented two other accounts, charged at eight dollars per thousand, for lumber sold in 1856, amounting to near three hundred dollars, which defendant paid promptly.

The court charged the jury:

"If the jury shall find for the plaintiff, they will allow him interest upon the amount which they may find to be due him from the time the money was due and payable by the contract; otherwise they will allow interest from the time of the institution of the suit."

To which instruction the defendant excepted.

The defendant then asked the Court to instruct the jury "that if it were to be a cash transaction, it was necessary the account should have been made out, that the party might know the amount."

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Which instruction the Court refused, and the defendant excepted.

The jury returned a verdict for the plaintiff for the sum of one hundred and eighty-one 35-100 dollars, upon which judgment was rendered.

Afterwards the defendant moved for a new trial, on the ground of newly discovered evidence, based on an affidavit, in which he declares :

“That, since the trial, the defendant has ascertained that he can prove by Charles Hartsfield that he was present when the contract was made between the plaintiff and defendant, and that the contract was that the plaintiff would sell to the defendant the lumber at eight dollars per thousand feet, to be paid when the account should be presented to defendant for payment. The defendant did not know, previous to the trial, that he could prove the contract by the said Hartsfield, or any one else; that said Hartsfield was witness in the case, and says the reason he did not prove the contract was that he was not sworn in chief, but only to answer such questions as should be asked him, and was not asked as to the contract.”

The Court overruled the motion for a new trial, and the defendant appealed.

*D. P. Holland* for Appellant.

We hold that this was an unliquidated account for goods sold and delivered; that there being *no evidence of interest* being contracted to be paid, the court erred in the charge.

There was no custom proved to charge interest.

There was no evidence of interest being charged.—See cases cited in Sedgwick on the Measure of Damages. 377; 1 Arch. N. P., page 300.

*A. H. Bush* for appellee :

In support of the charge of the Court, we contend, that if a debit ought to be paid at a particular time, and is not paid through the default of the debtor, compensation in damages equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default. Interest is considered as incident, legally, to every debt certain in amount and payable at a certain time.—See American Leading Cases, *Selleck vs. French*, pp. 493, 496, 498, 499, 506; 2 *Iredell's Digest* 591; 2 *Iredell's Digest*, 593, n. 13; 1 *Martin*, 37, *Karghn vs. Kennedy*; *State vs. Blount*, 1 *Hay.*, 4; *Ibid.*, 173; *Door vs. Adam's adm'r*, 5 *Munf.*, 21, 23; 1 *Mason*, 117; *Moore vs. Patten*, 2 *Porter*, 451. As to the South Carolina cases, see *Goddan vs. Bulow*, 1 *N. & M.*, 45, 56, 57, 60, 61, 62; *Harper's Law Reports*, 86.

If he seeks to avail himself of a tender, it should have been by plea with a *profert in curia*.—*Spann vs. Baltzell*, 1 *Fla.*, 301, 317.

Whenever the debtor can, by the terms of the contract, avoid the payment of a larger by the payment of a smaller sum at an earlier day, the contract is not usurious, but conditional, and the larger sum becomes a penalty.—2 *Iredell's Digest*, 815, n. 6; *Moore vs. Hylton, et al.*, 1 *Dev. Eq.* 429.

The application for a new trial ought not to be granted, because the affidavit does not show that the newly discovered testimony could not have been obtained in the first trial by the exercise of reasonable diligence.—*Graham on New Trials*, 463, 473, 475; *Watson vs. Dickens*, 12 *S. & M.* 608; *Williams vs. Young*, 13 *S. & M.*, 118; 1 *Caines*, 174; *Steinbuck vs. Col. Ins. Co.*, 2 *Caines' R.*, 133.

In this case, *Hartsfield*, by whom this testimony is to

be given, was introduced as a witness by defendant. Why was he not examined touching such matters?

A new trial ought not to be granted when the newly discovered evidence consists merely of cumulative facts or circumstances relative to the same matter controverted at the former trial.—Smith vs. Brush, 8 Johns. R., 84; Pike vs. Evans, 15 Johns. R., 210.

There was no obligation on the part of the plaintiff to prove that the account was made out from the book. It was the duty of the defendant to have sought the plaintiff and asked for his account and tendered himself ready to pay it. He was told by Graves that the plaintiff made out the account from the books. The defendant told Hartsfield to present the account to him in three days, and he would pay it. Why such a request? Why not have gone to plaintiff or even to his agent, instead of requiring the agent to go to him?

DUPONT, J. delivered the opinion of the Court.

This was a suit instituted in the Circuit Court of Jackson county, by the appellee against the appellant, for the recovery of the amount due for a bill of lumber delivered at various times during the year 1855. The suit was commenced on the 21st day of April, 1857, and the declaration contained the single indebitatus count for goods sold and delivered, and the issue was joined upon the plea of *non assumpsit*. The evidence adduced upon the trial established the fact, that the price of the lumber, if paid for within the current year, was to be eight dollars per thousand, but if not paid for by the close of the year, then it was to be ten dollars per thousand. Upon this evidence, the Court charged the jury as follows: "If the jury shall find for the plaintiff, they will allow him interest upon the amount which they may find to be due him, from the time

the money was due and payable by the contract, otherwise they will allow interest from the time of the institution of the suit."

Under this charge of the Court, the jury found a verdict for the plaintiff, for the whole amount of the account, estimating the price of the lumber at ten dollars per thousand, and gave interest thereon from the first day of January, 1856.

The appellant excepted to the charge of the Court, and this constitutes the first error assigned. In support of this exception the counsel for the appellant contended, first, that there being no evidence of any *contract* for the payment of interest, the charge was irrelevant and calculated to mislead the jury; and secondly that the demand sued upon being an open account and unliquidated, the law did not authorize the giving of interest.

With respect to the first point it is undoubtedly true that the charge of the Court ought always to be relevant and strictly confined to the evidence adduced upon the trial. The correctness of this position is too obvious to need the enforcement of argument. But it is not every irrelevant instruction that will afford a ground for error. The instruction to be erroneous, must be not only irrelevant, but likely to mislead the jury in the formation of their verdict. We do not think that this instruction was calculated to have that effect, although the first clause of it may in some measure partake of the character of an abstract proposition, considered in reference to the evidence that was actually submitted to the jury. With respect to the second point, it is equally true, that as a general rule, the law did not anciently allow interest to be given upon an open account, or an unliquidated demand, of any character. But this rule was not universal, nor was the practice of the English Courts settled or uniform upon this sub-

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ject, prior to the enactment of the 3 & 4 William 4th. It is indeed truly extraordinary that a question of such frequent occurrence should ever have remained for any length of time unsettled. So contradictory were the English authorities down to the time of Mr. Campbell, that in a note to *D'Havilland vs. Bowerbank*, (1 Camp. R., 53,) he is made to say: "It would fortunately be very difficult to fix upon another point of English law on which the authorities are so little in harmony with each other." We may reasonably presume that it was this very want of uniformity, and a prudent desire to limit the arbitrary discretion of Courts and juries, which induced the enactment before referred to.

Unfortunately for American jurisprudence, the same want of harmony is discoverable in the adjudications of our Courts; but while the current of the English decisions would seem to sanction the position assumed by the counsel of the appellant, as the general rule on the subject, we are inclined to the opinion that the converse of that position, under certain restrictions, will be found to embody the American doctrine.

It is laid down in *American Leading cases*, page 498, that "in this country, the general principle has long been settled, that if a debt ought to be paid at a particular time, and it is not then paid through the fault of the debtor, compensation in damages equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default. Interest is considered as incident, legally, to every debt certain in amount, and payable in a certain time."

Mr. Perkins, in a note to his recent edition of *Chitty on Contracts*, (page 558 note) says: "But according to the American authorities, interest will be allowed after a demand of payment of an unsettled claim for goods sold and

delivered, or services rendered, from the time of the demand; and a presentment of the account, or commencement of suit, is sufficient demand upon which to found, and from which to date a claim for interest."

Notwithstanding the sanction of these two American writers, it is yet painful to reflect that there is still such want of harmony between the Courts of the different States, that it is venturing almost too much to declare what is the American law upon the subject. Each State seems to have a rule for itself, and in the midst of these conflicting views, it will not be deemed unbecoming in us, should we cease to pursue the bewildering lights of other States, prescribe to ourselves that rule which to our minds is most consonant with sound reason and enlightened policy, and which has been acted upon from the earliest organization of our Territorial government, to the present time. In pursuance of that object, we are inclined to hold that in all cases where the demand sued for is a debt *eo nomine*, in contradistinction to unliquidated damages, interest is allowable thereon from the time when the same becomes legally due and payable; and when no such time is ascertainable, then interest is allowable only from the date of an actual demand of payment, or of the commencement of the suit. Applying this rule to the charge of the Court complained of, and it seems to have been eminently calculated to guide the jury to a proper conclusion in the formation of their verdict. It is true that the verdict is not in strict conformity to the instruction, and had a motion been made for a new trial *on that ground* and refused, and were the error of such an amount as to demand consideration, we might be inclined to give the defendant a new trial, for the purpose of having it corrected. But the amount of the excess is so trifling, that acting upon the maxim of "*de minimis non*

*curat lex*," we are indisposed, by remanding the cause, to subject the parties to additional costs, which would probably amount to more than the actual excess of the verdict. The evidence shows that a demand for payment of the account was made some time in the year 1856, but the precise date is not stated. The suit was instituted on the 21st day of April, 1857. The error in the verdict therefore, is, that the interest was calculated from the 1st day of January, 1856, when in conformity with the instruction of the Court, it ought to have been calculated only from the date of the commencement of the suit, or at farthest, only from the 31st day of December, 1856. The excess in the one case amounts to about nine dollars and in the other, to about eleven dollars—a sum too small, considering the amount of the principal demand, to subject the parties to further litigation. This amount, the plaintiff ought in conscience to remit.

The second error assigned is that the Court erred in refusing to give the following instruction, which was asked for by the plaintiff, to wit: "That if it (the purchase of the lumber) were to be a cash transaction, it was necessary the account should have been made out, that the party might know the amount."

Upon referring to the evidence in the record, we do not think that the instruction, asked was necessary to guide the jury to a correct conclusion, and that it was very properly refused.

The second error assigned is therefore overruled.

The third exception is to the refusal of the Court to grant a new trial. Under our statute, error may be predicated upon the granting or refusal of an application for a new trial. Whenever an application of this character is made, it must be accompanied by an affidavit setting forth the grounds of the application. The affidavit in this case is as

follows: "The defendant petitions the court for a new trial in the above case upon the following grounds—that since the trial, the defendant has ascertained that he can prove by Charles Hartsfield, that he was present when the contract was made between the plaintiff and the defendant, and that the contract was, that the plaintiff would sell to the defendant the lumber at eight dollars per thousand feet, to be paid for when the account should be presented to defendant for payment. The defendant did not know previous to the trial that he could prove the contract by the said Hartsfield, or any one else. That said Hartsfield was a witness in the case, and says, the reason he did not prove the contract was, that he was not sworn in chief, but only to answer such questions as should be asked him, and he was not asked as to the contract."

The affidavit is clearly insufficient, for the very obvious reason, first, because of the very manifest carelessness exhibited by the defendant in getting his evidence before the jury; and secondly because, the evidence which he now seeks to avail himself of through a new trial, is entirely cumulative. With reference to the first ground of objection, it is pertinent to remark that Hartsfield, whose testimony it is sought to obtain, was introduced as a witness and did testify at the trial of the cause. The only excuse alleged for his not having testified as to the contract, is that he was not sworn in chief, but only to answer questions and that no question was asked him touching the contract. He was the witness of the defendant, and if he was either improperly sworn, or insufficiently examined, it was the fault of the defendant, of which he ought not now to be permitted to complain. It is a well settled rule, in reference to the granting of new trials in the Courts of common-law, that the party applying on the ground of newly discovered evidence must make his vigilance apparent, for if

it is left even doubtful, that he knew of the evidence, or that he might, but for negligence, have known and produced it, he will not succeed in his application. 1 *Graham & Waterman on New Trials*, 473.

It is laid down in the foregoing authority (3 *Gra. & Wat. on N. T.*, 1,029,) that the discovery after the trial that the witness knew a material fact which he did not disclose, furnishes no excuse, if he was not questioned as to it. And again, (at page 1,030,) that where the defendant, in an action on a promissory note, discovered after the trial that he could prove by a witness examined on the trial the payment of the note, which fact he was not aware of before or during the trial; held, that as ordinary diligence should have induced the defendant to enquire of the witness in respect to so material a point while he was being examined, he was not entitled to a new trial.—(Citing *Wright vs. Alexander*, 11 *S. & M. R.*, 411.) This latter citation is precisely in point, and conclusive of the application made in this case.

But, admitting that there had been no negligence on the part of the defendant, then we hold that the application was inadmissible upon the second ground above stated, to wit: that the evidence sought to be procured is cumulative. The application for the new trial is put upon the ground that the defendant would be able to prove, by a re-examination of Hartsfield, that "he (the witness) was present when the contract was made between the plaintiff and defendant, and that the contract was, that the plaintiff would sell the defendant the lumber at eight dollars per thousand feet, to be paid for when the account should be presented to defendant for payment." But the terms of the contract were fully proved upon the trial by another witness, (Graves,) whose testimony agrees in substance with that proposed to be given by Hartsfield. He testifies

that "he (witness) was the miller who had charge of plaintiff's mills; that the lumber charged in the bill of particulars was sold and delivered, and that the custom of the mill was, where there was no contract, the price of lumber was eight dollars per thousand, cash, or when called for during the year, or eight dollars if paid by the end of the year—otherwise, ten dollars per thousand; that defendant said he would pay cash."

Here it will be seen that there is no material variance between the testimony of Graves touching the terms of the contract and that proposed to be obtained by a re-examination of Hartsfield; and it is a well-settled rule, that on a motion for a new trial, on the ground of newly discovered evidence, if the evidence proposed to be obtained be merely cumulative, or in corroboration of testimony to a point presented at the former trial, the motion will not be granted.—1 Graham & Waterman on New Trials, 486.


It is ordered and adjudged that the judgment of the Circuit Court, pronounced in this cause, be affirmed.

BALTZELL, C. J., dissenting.

This is a suit instituted by the appellee, Blackshear, to recover the amount due him for lumber, sold and delivered to appellant, Milton.

The principal question is as to interest and the rule which should prevail in cases of this kind. The proof is, that "*the custom of the mill* was, when there was no other contract, the price of lumber was eight dollars per thousand, cash, or when called for during the year, or if paid by the end of the year—otherwise ten dollars per thousand." Defendant said he would pay cash; that defendant called for his account; that witness told him that Mr. Blackshear made out the accounts from the books. Another witness testified that he, as the agent of Blackshear,

informed defendant, in January, that he had the books in which the lumber accounts were kept, to collect the accounts due; that defendant informed him, if witness would bring the account in at any time within three days he would pay the amount, which was \$8 per thousand; that previous to that time the account had not been made out from the books. Another witness says, he presented the account some time in 1856, at \$10 per thousand, and defendant refused to pay it, but tendered witness the money at \$8 per thousand. Defendant paid promptly the other accounts charged at \$8 per thousand, sold in 1856. On this evidence the Court instructed the jury, "that if they find for plaintiff, they will allow interest upon the amount of which they may find to be due him from the time the money was due and payable by the contract; otherwise they will allow interest from the time of the institution of the suit." The Court below seems to have been of the opinion that there was a contract fixing the time of payment for the lumber. Their charge is clearly predicated upon this assumption, and the jury found their verdict accordingly. If there was such contract, it is to be found in the expression of the witness just stated, as to "the custom of the mill;" for there is no proof elsewhere of any agreement as to price. We may infer that the witness designed to say, it was the custom of the owner of the mill to make the charge. The enquiry then arises, does a habit of the owner of an article create a liability on the part of purchasers to pay the price he may thus charge? Most clearly not. It may not be denied that custom will sometimes influence a contract by adding stipulations to it and by controlling and varying the meaning of the words. But, to entitle it to this effect, it must "fall within the reason of the rule, which makes it a part of the contract; and it comes within this only when it is so far



established and so far known to the parties that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established, and not casual—uniform and not varying—general and not personal—and known to the parties.”—2 Parsons on Cont., 48, 53. “As a general rule, the knowledge of a custom must be *brought home to a party* who is to be affected by it. But, if it be shown that the custom is ancient, very general and well known, it will be often a presumption of law that the party had knowledge of it—although, if the custom appeared to be *more recent* and less generally known, it might be necessary to establish by independent proof the knowledge of this custom by the party.”—2 Parsons, 56; 4 M. & W., 211; 5 Adolph. & Ell., 302; 1 B. & Ad., 505.

In the case of Stevens vs. Reeves, the effort was to apply the usage of a factory to an individual and the particular contract before the court. “There was no stipulation for any particular time, so that there it no express or implied contract that he would remain for any certain time, unless such contract is to be implied from what is set up in evidence as a usage of this and the neighboring factories, that all who are employed shall be held to remain until a fortnight after they give notice of an intention to quit. In order to make this a part of the contract, *as the usage is a particular one* and not a general custom, it should have appeared that the defendant knew of the usage when he entered upon the work, or before he left it. This is required in order to give effect to the particular usage, so as to operate upon a contract.”—9 Pick., 200; 2 Wend., 501.

In another case decided by the same intelligent Court, they say, that “usages of banks and other public institutions, and sometimes of individuals, may be legally proved, is well settled; and when such usages are known to the

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parties, and business is transacted with reference to them, they enter into and form a part of the contract. *But the usages of individuals* cannot affect their contracts, unless it appear that the usage was known to the persons with whom they contracted. The usage is an independent fact, which, if proved, could not avail the plaintiffs, unless they would also bring a knowledge of it home to defendant.”—Loring vs. Gurney, 5 Pick., 17; 3 Comstock, 502.

Rejecting from our consideration the evidence as to the usage, there remains but an open account for lumber sold by plaintiff to defendant, the only evidence as to price in the record being that ten dollars per hundred was claimed to be due by plaintiff and eight dollars paid on a like claim by defendant. The claim of plaintiff was then for as much as the lumber was worth, that amount to be assessed by the jury—a claim for unliquidated damages. The Court erred, then, in giving an instruction to the jury, assuming the fact of proof of a contract as to price. There is no pretext, then, for the claim of interest, except from the time of demand or the institution of the suit, and only on the amount of lumber at \$8 per thousand. The English and American authorities are all agreed in this.—Chitty on Contracts, 504, notes. The rule is well settled, that interest is not recoverable on running or unliquidated accounts, unless there is an agreement, either express or implied, to pay interest.—6 Johns. Chy., 45; 2 Wend., 413, 501.

“The law does not give interest in such a case, (it was of goods sold and delivered,) and it can only be recovered when there was either a stipulated term of credit, which has expired, or an agreement, either express or implied, to pay interest.”—Esterly vs. Cole, 3 Coms., 503; 1 Am. Lead. Cases, 352.

The American Courts held, that interest may be given

on such a claim after demand of payment, or the account is liquidated that is rendered and no objections made to it, and if no special demand after the commencement of the suit.—2 Parson's on Cont., 381; 12 New Hamp., 484; 11 Wend, 478; Am. Lead. Cases, 353.

And this would comport with right and justice in the case before us, even if the custom as to the price were proved; for the evidence was that defendant called for his account before the expiration of the year, (we may reasonably infer for the purpose of payment,) but it was not furnished him, so that he was not in default in not paying, but the creditor, in not giving his bill and information as to its amount. To allow him, under such circumstances, to enlarge the price so greatly as to add two dollars a thousand, and give interest on this increased sum likewise, is going to an extent far beyond the most liberal of any of the authorities. "The decisions of the courts are greatly wanting in harmony, especially the American," it is said, "each State having a rule for itself, so that it is venturing too much to declare what is the American law on the subject." I do not assent to this proposition, and a more careful examination of the cases decided would, I think, with due deference, have led the court to the very opposite conclusion. It is to be noticed, that there is no branch of the law more various and extended, accommodating itself to every difference of aspect in which a case may be presented, more and more intricate as the expansion of commerce during the last century may have produced such a result. To meet this phase and change, and the cases arising, and to dispose of them satisfactorily—to apply extract and illuminate the rules and principles, so as to constitute a system founded in justice and right, has been the high office, province and duty of the jurists and judges that have adorned

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the American Courts—of Marshall, Kent, Story, Washington, Spencer, Savage, Marcy, Livingston, Thompson, Johnson, and others no less distinguished of the Courts of the United States, of New York, Pennsylvania, Massachusetts and others, and most nobly and skilfully has their work been done. That there may not be an exact concurrence of opinion in all respects, is not by any means surprising. The wonder is, that in such a number of cases adjudicated, there is so little conflict, such slight difference of opinion. Can we withhold the expression of our admiration that a system has been constructed so admirable for its wisdom, justice and excellence, and so well suited to all the various exigencies of business—so well adapted to the rendering equal and complete justice to parties? This tribute will be cheerfully rendered on an examination of the decisions, a summary of which is seen in the first volume of *American Leading Cases*, 346. I greatly doubt whether the preferred rule of this court will be found, on comparison, to be in any respect superior “to the bewildering lights” furnished by these decisions, or that it would be desirable to blot them out to make way for its better illumination. “Precedents and rules must be followed, unless flatly absurd or unjust.” Hence it is an imperative obligation on the part of a Court announcing a new law or rule differing from that already established, to demonstrate not only its injustice and impropriety—not only that what is already declared is not law, but also that the rule of their making is the superior and better, the true law. It is not sufficient to say that there is a want of harmony and a painful conflict to justify the making a new rule.

Of all others this last is the most delicate, inasmuch as such action operates on the past as well as the future, thus in all probability imposing hardships upon the citizen in not knowing how far, and to what extent his rights of prop-

erty, even of life or liberty, may be affected. Not so with a law made by the Legislature, which operates for the most part only in the future. We have here no analysis of the law as declared by other Courts—no presentation of the superior claims of the new rules. It is said, merely, that in the mind of the Court, “it is consonant to sound reason and enlightened policy.” Now it is not difficult to see that this is directly opposed to correct judicial action, and makes the *ipse dixit* of the judges the *sic volo sic jubeo* of the magistrate the supreme law of the land.

By the rule made by the Court, now for the first time announced in its application to the present case, the property of defendant is taken from him and awarded to plaintiff, not in virtue of an existing law, nor because there are decisions of this or other Courts authorizing it, but because in their view there is another principle, and a law, superior and better. Surely there is no authority for any such action, and it is directly opposed to the spirit of our institutions, to the Constitution and the laws. I feel bound as an act of imperious duty to express my dissent and disapprobation of it. “The judges, it is well said, are intrusted by the Constitution with a portion of jurisdiction, defined and marked out by the common law and acts of Parliament, and it is a principle consonant to the spirit of that Constitution and which may be constantly traced as pervading the whole body of our jurisprudence, that *optima est lex quae minimum relinquit arbitrio judicis; optimus judex qui minimum sibi*, that system of law is best which confides as little as possible to the discretion of the judge—that judge the best who relies as little as possible on his own opinion.” Broom’s Maxims, 36.

“By what maxims are judges of the Courts to be guided in their expositions, on what ground will their determina-

tion rest? Are the Courts to proceed upon established principles—to be governed by fixed rules, or, exercising a liberal discretion, to have recourse in doubtful cases to natural principles—to aid and moderate the law according to equitable considerations—to include in their deliberations those cases and circumstances which the legislator himself would have expressed had he foreseen them? To an English lawyer, brought up with sober veneration of the wise maxim, (so consonant to the spirit of our institutions and so constantly to be traced in the reading the whole body of our jurisprudence,) that *optima est lex quae minimum relinquit arbitrio judicis; optimus judex qui minimum sibi*; the question would seem to present little difficulty." 2 Dwarris on Stat. 182; Smith's Com. on Const. 280.

"In other countries," an eminent author says, "every thing is left *in the breast of the judge* to determine, yet with us he is only to *declare and pronounce, not to make or new-model the law.*" 3 Black. Com. 327.

In the decision of other Courts there is no undertaking on the part of eminent judges to make new rules, independent of the authority of their predecessors, but an effort to carry out the common law by the application of its principles to new cases, and modifying the rules flowing from them. Thus in Massachusetts, on this subject, the Court, after a careful examination and analysis of the authorities both English and American, say, "We have no statute regulating this subject, and none is necessary. Upon the principles of the common law, we think that it is clear interest is to be allowed when the law by implication makes it the duty of the party to pay over money to the owner, without any previous demand on his part." Dodge vs. Perkins, 9 Pick. 388.

In another important case, decided by the Supreme Court and afterwards the Court of Errors of New York,

the leading case on this subject, there is a masterly examination of all the decisions in this country and in England, more especially by Senator Spencer, whose effort was to educe rules from the precedents and decisions, and not make them, independently of the authorities, against which he most earnestly protested as not being within the province of the judiciary. *Rensalaer Glass Factory vs. Ried*, 3 Cowen, 419; 5 Cowen, 628.

I allude to his opinion more particularly as the Senator was in the minority, differing with the Court as to the allowance of interest in the case before it.

In reference to the subject at issue before us, the Court declares that interest shall not be given where the damages are liquidated. It adopts the American decisions in their most liberal extent, merely giving a different expression, to the principle established, whether with more force, greater precision, more clearness and propriety of expression, remains to be seen hereafter. The Court admits that the verdict does not conform to the instruction of the Court, as it gives too large a sum in damages by nine or eleven dollars, but asserts that this is too small to justify a reversal, quoting the maxim *de minimis non curat lex*, declaring at the same time that plaintiff ought in conscience to remit this sum. On reference to the authorities on this point, it will be found that the court will not set aside a verdict where the damages are uncertain, but will where the amount is certain. In the early cases, five shillings and twenty shillings were considered too small. 2 Salk. 64-72; *Strange*, 940-1051; *Doug.* 509.

In more recent cases, where the verdict was for less than £20, this was considered trifling under a statute of 38 Geo. 3d. See *Tidd's Practice*, 940. This was when the plaintiff obtained a verdict for these small sums. But it is not presumed that these cases have an application to this

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State, where the jurisdiction of the Circuit Courts in all matters, civil and criminal, not excepted in the Constitution, is unlimited as to amount.

In *McMillan vs. Savage*, the Court held the jurisdiction of the Circuit Courts to extend to forty dollars. 6 Florida, 750.

It may be well doubted whether the ruling of the English Courts as to the smallness of the sum, unless absolutely trifling, is applicable here, except for amounts in which an appeal would not lie from a Justice's Court.

Under the view I take of the subject, the lumber was sold at \$8 per thousand, this being the only evidence of price, and the demand for payment was some time in 1856, making 31st Dec. 1856, as the period of computation to the date of the judgment—so that an error has been made to the prejudice of plaintiff of \$45.25, or thereabouts.

We all concur that the jury erred in allowing too much damages. I hold that the Court erred in giving to the jury an erroneous instruction, calculated to mislead them, making a verdict against the law and the evidence. In my view there has been a mistrial—no rightful trial of the case on its merits, which have been mistaken by both Court and jury. It is a case where there is no evidence to warrant the finding of the jury, and the Court should have granted the motion for a new trial, although a different cause was assigned and relied upon in plaintiff's affidavit. If the Court mislead the jury as to the legal effect of certain evidence given to them, it is but justice that the Court *ex-officio* order a new trial." 4 B. Monroe, 476.

FARISH CARTER, APPELLANT, vs. W. G. M. DAVIS, A. G.  
SEMMEs AND OTHERS, APPELLEES.

1. A party has his standing in a court of equity so long as he is interested in contesting the amount to be decreed against him in favor of collateral parties, notwithstanding he may have settled with the principal creditor during the progress and pendency of the suit.
2. In a conflict between the lien of attorneys upon a judgment recovered by them and the equitable setts-off of the judgment debtor, the Court will not undertake to determine arbitrarily what amount of professional aid was necessary to prosecute the suit to judgment. Yet it will interfere so far as to confine the claims of the attorneys for services within the limits of a just and reasonable compensation.
3. An attorney has a lien upon a judgment, for his services in obtaining the same, superior to any equitable setts-off of the judgment debtor. The case of Carter vs. Bennett (Florida Reports) noticed and approved.

This case was decided at Jacksonville.

Appeal from a decree of a Circuit Court for Leon county, in chancery.

A. T. Bennett had recovered a judgment, in an action of trover in the Circuit Court for Franklin county, against Farish Carter, for about twenty thousand dollars. Carter appealed from said judgment to the Supreme Court of this State, and the judgment having been affirmed, he appealed therefrom to the Supreme Court of the United States. A. G. Semmes, W. G. M. Davis, Finley & Campbell and Thomas Baltzell were at different times engaged as the attorneys and counsel for Bennett in the Circuit Court; W. G. M. Davis and Finley & Campbell were likewise engaged in the Supreme Court of the State, and W. G. M. Davis in the Supreme Court of the United States.

Afterwards, Farish Carter filed his bill of complaint against Bennett and Robert May, to whom Bennett had

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assigned his said judgment in trover, and against Davis, Semmes, Baltzell and Finley & Campbell, as attorneys of Bennett, who claimed a lien for their fees upon the said judgment, in which bill Carter set up certain equitable claims against Bennett, which he charged should be allowed against said judgment, and also alleged that the judgment in trover was inequitable and should be perpetually enjoined. On motion of counsel for Carter, an injunction was granted restraining all proceedings on the judgment, and the execution which issued thereon, until the further order of the Court. On the coming in of the answer of Bennett, the Circuit Court dissolved the injunction, and Carter appealed to the Supreme Court. At the January term, 1855, the Supreme Court decided that the order of the Circuit Court dissolving the injunction was erroneous, and ordered the injunction to be reinstated and remand the cause for further action to the Court below. It was also determined by the Supreme Court, that the attorneys of Bennett held a lien upon the judgment in trover superior to the equities set up by Carter, and the Court directed the Court below to ascertain the extent of the lien which should be a reasonable and adequate compensation.

After the cause was remanded to the Supreme Court, Carter compromised and settled the case with Robert May, the assignee of the judgment and the agent of Bennett, by the payment of an amount which was received by May in full satisfaction, with a stipulation that the said satisfaction was not to release any lien which the attorneys of Bennett in said trover suit might have upon said judgment and which the Court of Chancery might decree to be properly chargeable to Farish Carter, either at law or in equity, and also declaring that the object of the covenant was not to create a liability on the part of

said Carter to pay the attorneys of Bennett, if no such liability otherwise existed in law or equity.

The only remaining question is as to the fees claimed by the attorneys of Bennett, as liens upon the said judgment.

A. T. Bennett, in his answer, says, that the fees due A. G. Semmes, as one of the counsel in the said suit in trover, is the sum of five thousand dollars, and the fees due W. G. M. Davis, defendant's other counsel in said case, is the sum of three thousand seven hundred dollars, which said fees were due before the filing of complainant's bill of complaint.

George S. Hawkins, a witness examined by complainant, testified that he knew of the case of Bennett vs. Carter in trover; should suppose ten per cent. on the amount of the verdict, for services at the trial, a fair compensation divided between two counsels, or as many as might have been employed; the verdict was within a fraction of \$20,000; does not know who argued the case at the trial; believes Davis and Finley argued it in the Supreme Court; ten per cent., he thinks, would also be a fair compensation for services in the Supreme Court; thinks the gross amount of twenty per cent. about fair, on the hypothesis that there was no contract, and taking the circumstances of the case into consideration; it is not usual for attorneys to charge the same amount when they are employed with other counsel, as when they are employed to take the whole responsibility of the case, alone; witness believes Judge Baltzell ceased to act as attorney for Bennett in the spring of 1845, when he was elected judge; Judge Semmes acted as Bennett's counsel until he was elected judge; believes that Davis' employment commenced at the trial (or just before) in the Circuit Court; Bennett, during the time and pendency of the suit, was re-

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puted insolvent; his circumstances were embarrassed; believes his counsel looked to the fund recovered as the one on which they depended for their remuneration; witness was employed with the late W. H. Brockenbrough as attorney in the case for Carter; witness merely filed pleas before he went upon the bench; Carter agreed to pay seven hundred dollars for this and other cases, which was all we were to look to; R. J. Moses appeared at the trial for Carter who, witness believes, received five hundred dollars; at any rate, he thinks five thousand dollars, in the aggregate, as a full and adequate compensation for services in both Courts.

*Cross-examined.*—Was not present at the trial. Did not have any intimate knowledge of the case after he became judge. Does not know the amount of labor performed, but has an idea of the nature and character of that labor. The knowledge he has is derived from the record, conversations with counsel and others, and from supposed analogies existing between this and other cases. The case he considers difficult, and he knew of the great labor bestowed by Judge Semmes. There was great prejudice and feeling against Bennett at the time the suit was instituted, but a most prompt reaction took place before the trial. On the hypothesis that there existed a prejudice and feeling against Bennett, and of the disagreeable nature of the litigation between Carter and Bennett and the difficulty of sustaining the claim of Bennett, witnesses suppose a lawyer's services are entitled to higher compensation; as where there is much feeling and disagreeable incidents connected with the suit, in the same ratio should lawyers be paid. Witness is persuaded that the suit was conducted by the counsel for Bennett with adroitness, skill and ability, and most was made of a case, whatever its legal claims to success, morally it had none, in the opin-

ion of witness. If witness is correct, he supposes, owing to the disagreeable duty of advocating such a suit, counsel should be paid more liberally than for an ordinary suit in trover. The counsel employed by Carter were all eminent as lawyers, and witness deems this fact as one enhancing the value of the services of Bennett's counsel. Judge Baltzell was counsel for Bennett in the case of the Georgia Railroad and Banking Company, afterwards amended at the instance of Carter. The entire responsibility of the defence seemed to rest on Judge Baltzell. The services of Judge Baltzell in the case alluded to were of a difficult character embracing delicate points of law.

Caraway Smith, another witness examined by complainant, testified that he knew of the suits of Bennett vs. Carter in trover and of Roberts, Allen & Co., vs. Carter. Witness was engaged with R. J. Moses to conduct the cases in the place of Mr. Brockenbrough, who was sent to Congress, and of Judge Hawkins, then lately elected judge. No fee was stipulated, but witness was paid two hundred and fifty dollars as a retainer. Witness was absent at the trial, otherwise would have charged five hundred dollars more.

Messrs. Semmes & Davis conducted the cases in the Circuit Court. Knows nothing of the Supreme Court. Witness does not know of his own knowledge Thos. Baltzell, J. J. Finley or Finley & Campbell in the case. Cannot say what the services of Semmes & Davis were worth. Thinks if the fee had been certain, two thousand dollars would have paid both of them—if contingent, double the amount. Witness does not think the employment of several attorneys on the same side, according to the usual practice in Florida, justifies a full charge for each as if but one were employed. Witness thinks Bennett was very much embarrassed at the time and could

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not have responded to a demand of anything like five thousand dollars.

*Cross-examined.*—Witness says he could have “no personal knowledge” of the whole of the services and labor of Messrs. Semmes & Davis, but is satisfied that they did “yeoman services” in the cause.

Complainant offered in evidence a deposition of Thomas Baltzell, taken in behalf of Bennett in the suit in trover of Bennett vs. Carter, in which said Baltzell, in answer to the third cross-interrogatory, said “he made no express bargain with Bennett, neither for a specified nor a contingent fee. He has received, without knowing or recollecting exactly, about three hundred dollars. In case of success, or a continuance in his causes, would have charged and expected to receive more. *He has now no charge against him.*”

Thomas J. Eppes, who was examined as a witness for defendant, A. G. Semmes, testified that after the decision of the case of Bennett vs. Carter in the Supreme Court, the witness had a conversation with Bennett, and among other subjects of conversation the said case was mentioned. Bennett spoke of the services of A. G. Semmes, his attorney, and characterised them as both laborious and able, and stated that the fee agreed to be paid said Semmes was five thousand dollars, but went on to state in addition that he, Bennett, did not intend to be limited or confined to said amount, but designed paying said Semmes liberally, and without saying more, left the impression upon the mind of the witness that the fee was to exceed the said amount of \$5,000, so agreed, as before mentioned, to be paid said Semmes.

W. G. M. Davis, examined as a witness in behalf of defendant, A. G. Semmes, testified that he was in New Orleans in June, 1853, when Bennett showed him a letter from

said Semmes enclosing the account of Semmes for professional services in the trover suit of Bennett vs. Carter, and in a variety of other cases and business; that the charge made by said Semmes in his said account for services in said trover suit is the sum of three thousand five hundred dollars, as of the day of the judgment in trover; in addition to which he claimed interest from that day. Bennett said at the time, (June, 1853,) he thought the charge of itself not too high, but that in connection with the charge of other counsel it would make an aggregate larger than he would like, but added that he was willing to pay it. After Carter's present bill was filed, Bennett and Semmes calculated the interest on the \$3500 00, and added it to the principal, and then in the answer of Bennett the approximate result was put down as being five thousand dollars. Witness was well acquainted with the labor and services of Semmes in the trover suit, which was constant and arduous for a period of near six years. During a great part of said time, Bennett was in almost daily communication with Semmes about the case, and scarcely left him at leisure at any time without talking about the case and its attendant circumstances. Semmes bestowed great labor and research in the preparation of the case. He had to hunt up witnesses out of and in the State, prepare and send off interrogatories, and argue matters as to testimony, continuances, &c. He was opposed by the ablest counsel in the State, and had also to encounter, for a great part of the time, a strong prejudice against Bennett and his claim, which prevailed in Apalachicola. In consideration of these facts, and that he was not paid for his labor as it was performed, year by year, and made his charge after the recovery, witness thinks the charge made by said Semmes for his services a fair and proper one.

As to Judge Finley's services, witness knows what they

were and deems his charge of five hundred dollars in the Circuit Court, and five hundred dollars in the Supreme Court, a fair and proper charge.

The said W. G. M. Davis being also examined as a witness in behalf of Thomas Baltzell, testified that in his opinion the sum of five hundred dollars is a proper charge to be made in such a case as that of Bennett vs. Carter, as a retaining fee, which of course covers all the service, responsibility, and so forth, up to and at the time of the bringing of the suit. If he, witness, is asked whether such service if charged by Judge Baltzell as a retaining fee is a fair charge, he answers yes!

Defendant, Semmes, read in evidence a letter from Bennett to him, dated 6th January, 1853, in which he acknowledges the receipt of Semmes' account, and adds, "Notwithstanding I am fully aware that fees are due you and ought to have been paid long since, and it is a mortifying circumstance to me that my situation has compelled me to let them lay so long." Also, "you are fully advised as to the situation of the Carter claim out of which I hoped to get something to pay you up in full. I did not much expect (notwithstanding it has rested so long,) that you would call on me just at this time, knowing as you do my situation and chances of getting something from Carter. However, I will make every effort in my power—do all I can with the little start I have got, and hope, if no bad luck befalls me, to be able at no distant day to pay you up every cent."

Defendant Semmes, also read in evidence another letter from Bennett, dated 10th June, 1853, in which he states, "I regret that you do not set Mr. Davis' fee, as you employed him and are better capable than I am of judging of the value of his services. I hoped you would fix them. I believe he is desirous that you should do so. However, if

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you feel any delicacy about it, I will not insist on your doing so at the risk of incurring his ill will. From what he says, I take it, that he expects twenty-five hundred dollars, which, added to yours and Maj. Finley's, will make a round fee of eight thousand dollars. This sum having to be provided for, would leave a mere pittance out of my compromise I am likely to get from Carter for any interest I may have in the suits, or any money advanced towards expenses, fees, to Baltzell, Westcott, &c., advanced at the commencement of the suit. These fees are doubtless reasonable. I am not disposed to complain, but in candor to you as my friend, I must say (as you request me to give my views,) that the aggregate is more than I expected. I admit my incompetency to judge of professional services. I can only judge of what the effect will be on the amount of the claim."

Defendant, W. G. M. Davis, examined A. G. Semmes as a witness, who testified that he knew of the services rendered by defendant Davis, as attorney for Bennett in the case of Bennett vs. Carter, and Roberts, Allen & Co. vs. Carter. The said Davis had been consulted by Bennett about said cases before the trial in the Circuit Court. He was not present at the trial, but he arrived in time to argue the motion for a new trial and in arrest of judgment. The motions for new trial and in arrest of judgment were elaborately argued. Knows that Davis rendered services to Bennett in the Supreme Court, in said trover suit. Said services consisted in consultations and preparation for the argument of said case long before the trial thereof in the Supreme Court, and in the argument of the same for several days in said Court. Knows of said Davis going on to Washington City for the purpose of arguing said cause in the Supreme Court of the United States. Though he, witness, was not present, he has no reason to doubt but that

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said Davis did argue the same. Heard Bennett say he had employed Davis to go to Washington for that purpose, and heard him say afterwards that Davis had argued it. Before the argument of the trover suit in the Supreme Court, Davis wrote to Bennett in reference to the compensation he should claim for attending to said case, claiming two thousand dollars. Bennett did not conclude to allow it until after the trial in the Supreme Court was over and he had an opportunity of judging of the value of Davis' services, when he was satisfied with the charge made by Davis. Witness had several conversations with Bennett in relation to fees to be allowed his counsel. In these conversations Bennett stated that he had agreed to give Davis twelve hundred dollars to argue said case in the Supreme Court of the United States. In the opinion of witness, Davis was entitled to five hundred dollars for the services he rendered in the Circuit Court, two thousand dollars for his services in the Supreme Court of Florida, and twelve hundred dollars for his services in the Supreme Court of the United States.

D. P. Hogue, examined as a witness by defendant, Davis, testified that he was aware of the services of W. G. M. Davis in the Supreme Court of the State, in the case of Bennett vs. Carter, and is of the opinion that his own individual claim, unconnected with the claims of others, for fees, considering the magnitude, intricacies and difficulties of the questions involved, and the ability of Mr. Davis in the management of the cause, as well as the amount in controversy, is not too large. Knows nothing of the claim for fees at Washington.

The Court below decreed that A. G. Semmes was entitled to five thousand dollars with interest from 10th June, 1853; that William G. M. Davis was entitled to three thousand seven hundred dollars, with interest on five hun-



dred dollars of said amount from December, 1848, and interest on two thousand five hundred dollars of said amount, from 31st July, 1851, and interest on the balance of twelve hundred dollars from the 28th February, 1854; that Thos. Baltzell was entitled to the sum of five hundred dollars, and that Finley & Campbell were entitled to one thousand dollars, and that as to said sums the said attorneys were entitled to a lien upon the amount recovered in the judgment of Bennett vs. Carter in trover, in preference to the equitable claims set forth by Carter in his bill of complaint. From this decree Carter appealed.

*James T. Archer* and *R. J. Moses* for appellant.

*W. G. M. Davis* and *W. A. Forward* for appellees.

HON. B. A. PUTNAM, Judge of the Circuit Court of the Eastern Circuit, who sat in this cause in place of Baltzell, C. J., who was disqualified from interest, delivered the opinion of the Court,

Appeal from the Circuit Court of Leon county, sitting as a Court of Chancery.

A. T. Bennett had obtained in the Circuit Court for the county of Franklin a verdict and judgment thereon in an action of trover against Farish Carter, for the sum of \$20,000, or within a fraction of that amount; and in this suit counsel were employed by Bennett, among whom were A. G. Semmes, W. G. M. Davis, Finley & Campbell and Thomas Baltzell, all of whom were engaged in the case in the Circuit Court, some of them in the Supreme Court of the State, on the appeal from the Circuit Court, and W. G. M. Davis in the Supreme Court of the United States, to which Court the case had been carried also by ap-

peal. This suit grew out of transactions to which it is now unnecessary to refer, and which are irrelevant to the matters submitted to this Court for consideration. Subsequent to the obtainment of the said judgment by Bennett, Carter filed a bill against him, Robert May, assignee of the judgment and W. G. M. Davis and A. G. Semmes, attorneys of Bennett in the prosecution of said suit in trover, and who severally claimed to have a lien for their fees upon the judgment rendered therein superior to the alleged equities of Carter, and to be allowed the same out of said judgment. Carter in his bill set up certain equitable claims against Bennett, which were prayed to be considered and allowed. On motion of counsel in behalf of Carter, and after argument thereon, an injunction was awarded by the Court enjoining and restraining all proceedings upon the judgments and executions mentioned in the bill of complaint in favor of Bennett and others. Afterwards, and on the coming in of the answer of Bennett, the Court dissolved the injunction, and Carter prayed an appeal to the Supreme Court. The appeal was considered and the grounds thereof argued at a term held by the Supreme Court in 1855, at Tallahassee; and the Court held the order of the Circuit Court dissolving the injunction to be erroneous, ordered the injunction to be reinstated, and remanded the cause to the Circuit Court for further action.

The equities set up by Carter in his bill against said judgment of Bennett, came in conflict with the equitable lien claimed by Bennett's attorneys upon the same for professional services rendered by them in obtaining said judgment; and the Supreme Court, besides reversing the order of the Circuit Court dissolving said injunction, proceeded further to inquire into the said equities so presented and urged by Carter on the one side, and by Bennett's attor-

neys on the other; and held that the attorneys not only had a lien for their professional services upon said judgment, but that said lien constituted in their behalf a priority, but because the extent of that lien, or the value of the services, did not sufficiently and satisfactorily appear from any evidence in their possession, the Supreme Court deemed it necessary that an inquiry and investigation should be had in relation thereto, and the extent of the attorney's lien ascertained, which the court held should be reasonable and adequate compensation; and thus they prescribed a "*quantum meruit*" as the basis for the ascertainment of the extent of said lien.

The Circuit Court, in obedience to the mandate of the Supreme Court, proceeded to make inquiry and investigation required to ascertain the extent of the attorney's lien upon the judgment; and witnesses were examined and their depositions submitted. The cause coming on to be further heard before the Circuit Court for Leon county, on said bill, answers and depositions filed as aforesaid, and after hearing the same argument of counsel therein, the Circuit Court, on the 29th day of January, 1856, rendered a decree, and thereby ordered and adjudged, that the following named attorneys of Bennett, to-wit: A. G. Semmes, was entitled to \$5,000, with interest from the 10th day of June, 1853, for his services rendered in said action at law; W. G. M. Davis was entitled to the sum of \$3,700 with interest to be computed on \$500 of said sum from the—of December, 1848, and interest upon the balance of \$2,000 of said amount from the 31st day of July, 1851, and interest upon the balance of \$1200 from the 28th day of February, 1854; and that Thomas Balzell was entitled to the sum of \$500 for his services in said cause, and said Finley & Campbell were entitled to \$1000 for their services in said cause.

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And the court further decreed, that as to the said sums so adjudged to be due to said attorneys for their services rendered in said cause, they were entitled to a lien upon the amount rendered in said judgment, in preference to the equitable demands by said complainant Carter in his said bill set forth. And the Circuit Court further decreed, that the complainant should pay into court a sum sufficient to cover the amount of principal and interest decreed to be paid to Bennett's attorneys.

From this decree of the Circuit Court an appeal has been taken by complainant Carter to this Court, and the following are the grounds assigned for the same:

1st. The chancellor erred in considering the alleged contracts with Bennett the criteria or basis of the equity he was to administer, without reference to the question of the reasonableness of the alleged contracts.

2d. The court erred in considering and adopting any contract between Bennett and the solicitors not definitely made as to time and manner, that is in writing and before the service was performed.

3d. The court erred in determining upon the evidence that any contracts were proved.

4th. The Court erred in not adopting the basis of "*quantum meruit*" to determine the fees.


5th. That the sums allowed are exorbitant.

6th. That four counsel are allowed and separate compensation in one suit for one trial.

7th. The court erred in determining on the evidence that the solicitors were entitled to any lien, and that the judgment in trover was to be recognized as a valid judgment to the amount of the verdict.

A motion was submitted by counsel for appellees to dismiss the appeal upon the grounds—

1st. That the appellant has no such an interest in the



matter as gave him a right to appeal from the decree of the Circuit Court.


2d. That if he previously had such an interest, he had by the settlement and compromise made between himself and Bennett subsequently to the decree of the Supreme Court in the premises, parted with and extinguished the same.

The Court does not concur with the counsel in these views, nor does it assent to the truth of these propositions. Previous to the compromise referred to, the appellant possessed equitable claims against Bennett which he could make available as an off-set against his judgment at law, and which the Supreme Court have by its decree recognized, and which, but for the equitable lien of Bennett's attorneys upon said judgment for their services in obtaining the same, and which lien the Supreme Court has held to have priority over said equitable claims of Carter, might have entirely extinguished said judgment, or very much reduced it. Nor does this Court think that the settlement and compromise made by and between Carter and Bennett of all these legal controversies and claims against each other, including the said judgment in trover, has divested Carter of the interest he so previously possessed to have a fair and equitable adjustment of the claims of Bennett's attorneys upon that judgment, nor have they deprived him of the standing in Court to contest these claims with said attorneys, which, in virtue of his recognized claims, he had before the settlement and compromise. The compromise made the release and satisfaction of the judgment by Bennett subject to such lien as might be decreed to exist, chargeable to Carter, and which lien Carter was resisting, and subject to the lien of Bennett's attorneys, if any such lien be found to exist, and be chargeable by law or in equity against Carter—(see record,

page 37.) The compromise operated as a mutual release of all claims and demands mutually existing between them, and tied up the hands of both so as to forbid any legal proceedings by the one against the other, and which, so far as Bennett is concerned, extinguished the judgment and all his interest therein, yet kept it alive for the purpose of answering to and being made subject to any lien existing against it in behalf of Bennett's attorneys, and to this extent equally kept alive Carter's equitable claims against it; and although these were made subordinate to the equitable lien of Bennett's attorneys, yet they were sufficient for the purpose of resisting said equitable lien beyond an equitable extent. Besides, Carter, by the decree of the Circuit Court, was required to pay into Court a sum sufficient to cover the amount of principal and interest decreed by the Court to be paid to Bennett's attorneys. He was then still a party in the cause, subject to and subject to the Court's decree, and being not only still clothed with his unextinguished equitable demands against the judgment, but also having, by his agreement with Bennett, imposed upon himself the obligation to take the release of the judgment, subject to such lien as might be found to exist against the same in behalf of Bennett's attorneys, he had an interest to contest both the lien and its extent; and even if he was precluded by the decree of the Supreme Court, and subsequent compromise, from questioning the lien itself, he was not precluded from questioning its extent.

Taking this view of the subject, the Court considers that the appellant occupies a position which entitled him to appeal from the decree of the Circuit Court and therefore the motion to dismiss the appeal is overruled.

We proceed now to examine the grounds assigned for appeal.



As to the first ground, the evidence taken and used in this case does not, in our opinion, sustain the conclusion of appellant's counsel, that the court, in making its decree, made any contracts with Bennett the *criteria* or basis in administering its equity. Upon an examination of the evidence, we are unable to discover that any contract before or at the time of the rendition of the said services by Bennett's attorneys, other than an implied contract to pay whatever such services were reasonably worth, has been established to exist between Bennett and his attorneys.

There is nothing appearing in the decree to show, nor does its language so indicate, that the amounts decreed were arrived at by a consideration of any express contracts found or alleged to exist between the parties. On the contrary, the decree is entirely silent on this subject, and the evidence looks to a "*quantum meruit*," with the exception of some loose statements of Bennett, testified to by Mr. Eppes, and his own vague statement in his answer as to the amount due to A. G. Semmes, and some other admissions by him long after the rendition of the services, all which are mentioned by his statements in his conversation with Mr. Davis in New Orleans, in June, 1853, which indicate anything but a recognition of any previously existing contract between himself and his attorneys.

All this testimony speaks not of any contract, writing or verbal, made and entered into by Bennett and his attorneys either before or at the time said services were rendered, but, on the contrary, the witnesses speak of the compensation, in reference to its fairness and reasonableness, assuming as a basis a "*quantum meruit*," and it is upon such evidence the decree of the Circuit Court is founded.



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The second, third and fourth grounds are involved in the discussion of the first and answered by it.

As to the fifth ground, if the sums allowed by the decree of the Circuit Court are not justified by the evidence taken in relation thereto, then the charge that they are exorbitant may be correct, and, if so, it becomes the duty of this court to reduce them so as to conform to the evidence. On this point the court will hereafter express its views and make such order as may be proper in the premises.

As to the sixth ground, this court would unwillingly assume, except in cases where its interposition would be more clearly justifiable than is apparent in this case, to restrict an individual in the amount of professional aid he should invoke to assert or to defend his rights or interests, and yet it might with entire propriety in this and similar cases interpose so far as to confine the claim for services within the limits of a just and reasonable compensation.

The court does not perceive the force of the objection that four counsel should be employed and allowed separate compensation in one suit for one trial, when it appears that in such suit there were required unusual and extraordinary exertions, because it involved a large amount, great responsibility, unremitting attention and labor, surrounded by peculiar and pressing circumstances. If it shall appear that such commensation is neither unjust nor unreasonable, the individual himself, whose rights are invaded or withheld from him, is the most competent judge of the amounts and kind of professional auxiliaries he should employ to assert or to defend such rights; but to protect him or those subrogated to his rights from unreasonable exactions by those whom he had summoned to his assistance, may very properly be deemed a duty devolving on a court of justice. In this case, whilst the court

does not perceive the propriety of its regulating the number of the attorneys, it will exercise its authority to enquire into and confine their claims within the limits of justice and reason.

The court has been referred to the case of Edward C. Bellamy vs. Samuel C. Bellamy's administrator, decided by this court in 1855, and the rule adopted for that case has been invoked as a measure of compensation in this. This court does not intend to interfere with the rule or principle of allowance adopted in that case, but deems it unapplicable here, as the cases are not, in the opinion of the court, parallel.

As to the seventh ground, we do not think the court erred in determining on the evidence that the attorneys were entitled to a lien or in recognizing the validity of the judgment in trover. This court had already held that the claims of the attorneys constituted an equitable lien on the judgment, and, as such, to have priority. The extent of this lien, however, was to be ascertained upon the basis of a "*quantum meruit*." Now this court hold, that, however strong may be the equities of Carter, they must necessarily yield to this lien so far and to the extent it is ascertained to be just and reasonable, and to that extent the judgment stands as a security for its satisfaction. If any doubt could have been entertained previously on this point, or in relation to the character of the judgment, as being inequitable or not, the compromise, which is a part of the evidence in this case, made by and between Bennett and Carter subsequent to the decision of the Supreme Court, is well calculated to exercise exclude enquiry on that subject. If any lien should be found to exist in behalf of Bennett's attorneys, then the satisfaction, release and discharge of the judgment are not to effect such lien, but are ex-

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pressly made subject to it—(see record, page 37.) The same may be said in relation to the character of the judgment; and the opposition thereto upon the ground of its being inadequate has manifestly been abandoned by the compromise between the parties. The question, then, is not as to the existence of the attorneys' lien upon the judgment, but as to the extent of the same; and this court is to enquire whether the Circuit Court has carried out the directions of this Court and founded its decree upon the basis prescribed for ascertaining the extent of the attorneys' lien—that is, of a "*quantum meruit*," or has proceeded upon grounds not authorized by the decree of this court.

We are satisfied, upon examination of the evidence, that it is not sufficient to establish any express contracts, verbal or in writing, for compensation for services between Bennett and his attorneys, before or at the time said services were rendered by them, or by either of them, nor are we able to discover that the allowances by the Circuit Court have been made upon any such consideration. On the contrary, the evidence does not speak of the value of the services as being established, but of their reasonable value, and to which said services are justly and reasonably entitled and it is proper to conclude that the Circuit Court founded its decree upon the evidence before it. The counsel on both sides have taken a very wide range in argument, going back into the history of the original transactions between Carter and Bennett and his associates, out of which this case has arisen. We do not deem it expedient or material to enter this field of discussion to seek for information to guide us to a conclusion in the matters now under consideration. That history presents two aspects, neither of which is creditable to the parties; and, although it may afford entertainment to its readers, it does not enlighten

this court upon the points now presented for examination. Entertaining these views, we proceed to examine the allowances made by the Circuit Court as compensation due to Bennett's attorneys.

And, first, as to the amount allowed A. G. Semmes, we think the Circuit Court has erred, and that upon the evidence that allowance should not have exceeded \$3,500. It is clear that Semmes himself did not claim more than this as a principal sum up to June, 1853, nor at that time, and neither the evidence nor propriety warrants an allowance for principal beyond this.

Bennett, in his answer, filed on the 24th July, 1854, to the bill of complaint against him by Carter, says the fees due A. G. Semmes, as one of his counsel in the said judgment in trover, is the sum of \$5,000—that is to say, the sum for fees at the time said answer was filed; but W. G. M. Davis, in his deposition, (see record, page 53.) states, that in June, 1853, in New Orleans, Bennett showed him a letter from Semmes enclosing his account for professional services in the trover suit between Bennett and Carter and in a variety of other cases and business; *that the charge made by Semmes in that account was \$3,500, as of the day of the judgment in trover, in addition to which he claimed interest from that day—the day of the rendition of the judgment, that after Carter had filed his bill against Bennett, Semmes and Bennett calculated the interest on the \$3,500, added it to principal, and then, in the answer of Bennett, the approximate result was put down as being \$5,000. This explains the statement of Bennett, in his answer, that the amount due Semmes for fees was \$5,000. Of this amount \$1,500 are for interest and the balance, or \$3,500, are for principal.*

We do not deem it necessary, in this connection, to refer to nor to consider the testimony of Eppes in relation to

the statement to him by Bennett as to the amount due to Semmes for services in said suit, as it is manifest from Bennett's subsequent conduct and declarations that there was no specific agreement between himself and Semmes as to the amount of compensation; and, further, Semmes himself did not claim more than \$3,500 in June, 1853, for principal, as compensation for services. Davis, (see record, page 55,) after detailing the reasons for his opinion, says expressly, that he regards the *charge made by Semmes as a fair and proper one*, from which we conclude that his services, were, in the opinion of the witness, such as to entitle him to this amount of compensation upon the basis of a "*quantum meruit*."

Davis, from his position and intimate connexion with the suit in trover, had a better opportunity of witnessing and knowing the nature and extent of the services performed by Semmes, and therefore of making a just estimate of their value, than any other witness who has testified.

As to the claims of W. G. M. Davis for his services rendered in said trover suit, A. G. Semmes being asked (see record, page 66,) to state what, in his opinion, the professional services rendered to Bennett by Davis were worth, estimates their value in detail, and states, that those rendered in the Supreme Court of the State were worth \$2,000, and those rendered in the Supreme Court of the United States were worth \$1,200.

Mr. Hogue, also a witness for Davis, (see record, page 71,) expresses the opinion that the claim of Davis is not too large, and founds that opinion upon the magnitude, intricacies and difficulties of the questions involved, and the ability of Davis in the management of the cause, as well as the amount in controversy.

As to the claim of Finley, Davis expressed the opinion,

(see record, page 53,) that his charge of \$500 in the Circuit Court and \$500 in the Supreme Court is *fair* and *proper*, and he founds his opinion upon *his knowledge* of the services performed by Finley.

Therefore this court considers so much of the decree as allows \$5,000 to A. G. Semmes for his services is erroneous, and that \$3,500 is all that should have been allowed, and this without any interest thereon, and the court below is directed to correct the decree in this respect; that so much of said decree as allows \$3,700 to W. G. M. Davis is affirmed for the amount, but interest thereon is disallowed; that so much of said decree as allows \$1,000 to Finley & Campbell is affirmed for that amount without interest thereon.

With respect to so much of the decree of the Circuit Court as allows \$500 to Thomas Baltzell, this court, in view of the conflict of the evidence presented by the record upon the admissibility of this claim, is unprepared to come to a satisfactory conclusion. This matter is therefore referred back to the Circuit Court to be further enquired into; and if it shall be shown by the claimant, upon such enquiry upon further evidence, that he has not excluded himself from the compensation now claimed by him by his admission in his disposition made in the trover case of Bennett vs. Carter, and exhibited in evidence in this case, then he may be allowed such reasonable amount as the evidence may authorize the Circuit Court to award.

The court, looking to the circumstances of this case and in the exercise of its discretion as a court of chancery orders and decrees that no interest be allowed upon either of the sums which shall be definitely awarded by the Circuit Court to Semmes, Davis, Finley & Campbell and Baltzell until a final decree for the several and respective allowances shall be rendered by the Circuit Court.

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Ellison, Adm'r., vs. Allen.—Opinion of Court.

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BENJAMIN ELLISON, ADM'R., & C., APPELLANTS, VS. DAVID H.  
ALLEN, APPELLEE.

1. If a party, after judgment upon demurrer is given against him, goes on to amend his pleadings and make an issue to the country, he thereby waives his exceptions to the judgment upon the demurrer, and will not be permitted to assign it for error in the Appellate Court.
2. Where a defendant, after the service of process in a suit instituted against him, died, and the plaintiff afterwards and before the expiration of the time limited by statute for the presentation of claims to the administrator, asked for and obtained an order for a *sci. fa.* to make the administrator a party: Held, that the order thus obtained is equivalent to *and dispenses* with an actual presentation of the claim.

This case was decided at Marianna.

The facts of the case are fully set out in the opinion of the Court, to which reference is made.

*T. J. Eppes* for appellant.

*C. C. Yonge* for appellee.

DUPONT, J., delivered the opinion of the court.

The appellee brought his action of assumpsit in the late Superior Court of Calhoun county against John Jenkins on a written acceptance. The summons *ad respondendum* was made returnable to the April term, 1841, of the said Court, and was duly served. The declaration was filed at the return term of the summons, but before any issue between the parties had been joined the defendant died, and his death was suggested on the record at the April term, 1846, of the said court. At the December term, 1846, an order was entered on the record, directing a writ of *scire facias* to be issued to Benjamin Ellison, the administrator,

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to make him a party defendant. At the December term, 1848, a similar order was entered, directing an *alias scire facias* to be issued. At the November term 1849, at the spring term 1850, at the May term 1853 and at the December term 1853, respectively, similar orders were entered, directing the issuing of *pluries sci. fa.*; and at the April term 1854 the cause was transferred, by consent, to the Circuit Court of Jackson county. The record does not show that these several orders were ever complied with by the Clerk, or that there ever was any service of the writs, or any of them, if indeed they were ever actually issued. On the 25th day of March, 1854, however, the Clerk of Calhoun county did issue from his office a *pluries sci. fa.*, directed to the said administrator, requiring him to be and appear at the April term ensuing of said Court, to show cause why he should not be made a party defendant. The writ was duly served on the 31st day of the same month.

At the May term, 1854, of the Jackson Circuit Court the cause was ordered to be continued, with leave to the defendant to plead the statute of limitations within sixty days. On the 11th day of October, 1854, the defendant filed his plea in the following words, to wit: "And the said defendant by his attorney comes and defends the wrong and injury when, &c., in this behalf and says *actio non*, because he says that said demand of plaintiff was not exhibited to defendant within two years after granting of letters of administration to him, the said defendant. And the said defendant says, that he published a notice by advertisement, once a week for four weeks, in a newspaper published in the city of Apalachicola and known as the Commercial Advertiser, notifying all creditors, legatees and persons entitled to distribution that their claims and demands would be barred at the expiration of two years, as afore-

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said, unless exhibited within the same, and this he is ready to verify, wherefore he prays judgment and puts himself upon the country," &c.

This plea was accompanied by the following notice, to wit:

"NOTICE.—All persons having claims against John Jenkins, late of Franklin county, deceased, are requested to present the same, duly authenticated, within the time prescribed by law, or this notice will be pleaded in bar of their recovery; and all persons indebted to said estate are requested to make immediate payment.

"(Signed,)

B. ELLISON, *Adm'r.*"

"APALACHICOLA, June 4th, 1856."

The publication of this notice was proved by the affidavit of the printer of the paper in which it was published.

On the 9th day of May, 1855, the plaintiff filed his replication to the defendant's plea in the following words, to wit:

"And, as to the plea of defendant, filed herein, plaintiff says, *precludi non*, because he says the said suit has been pending ever since and prior to the decease of said intestate, and that a *sci. fa.* was ordered within two years after the date of said notice referred to in said plea, and this plaintiff is ready to verify."

To this replication a demurrer was interposed which, upon argument, was overruled by the Court, and the parties immediately joined issue in short, by consent. The issue being thus made up, at a subsequent term of the Court, to wit: at the fall term thereof, a jury was waived by the parties, and the cause was submitted to the judgment of the Court upon the evidence embodied in the bill of exceptions, (consisting of the record of the case in Calhoun Circuit Court above cited,) which, after the same

had been fully argued by the counsel, found the issue for the plaintiff, and gave judgment accordingly.

From this judgment the appeal to this court has been taken, and the following errors are assigned for the reversal of the same:

1st. The court erred in overruling the demurrer of defendant to the plaintiff's replication.

2d. The court erred in finding for the plaintiff upon the the issue joined.

The first error assigned presents no difficulty in the mind of the court, for, by reference to the plea, it will be seen that if the demurrer had been permitted to stand, it would have reached back to the defendant's plea, which is manifestly defective for want of sufficient certainty, and thus he would have been left without a defence. He therefore ought not to complain of the disposition that was made of it by the ruling of the court. But if this were not so, the overruling of the demurrer was improper. Still the defendant cannot, under the after proceedings had in this cause, be permitted to avail himself of this exception, for, it is well settled, that if a party, after judgment upon demurrer is given against him, goes on to amend his pleadings and make an issue to the country, he thereby waives his exceptions to the judgment upon the demurrer and will not be permitted to assign it for error in the appellate court. If the defendant had desired to have that ruling reversed by this court, he should have refused to go to the country and have permitted the judgment on the demurrer to stand. Going to issue on the pleading operated as a waiver to the exception.—United States vs. Boyd et al., 5 Howard S. C. Rep., 29.

The second exception presents for adjudication a question of greater difficulty, and it has been only after much

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anxious deliberation that we have been enabled to arrive at a conclusion satisfactory to ourselves.

The statute upon which the defendant's plea is based is commonly known to our practice as the statute of "*non claim*," and is in the following words, to wit:

"All debts and demands, of whatsoever nature, against the estate of any testator or intestate, which shall not be exhibited within the said two years, shall forever afterwards be barred: *Provided*, that the executor and administrator shall, by an advertisement, to be published once a week for the space of four weeks, in some newspaper printed in this State. give notice to all creditors, legatees and persons entitled to distribution that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same, saving, however, to married women, infants," &c.

The reference as to the time at which the limitation is to commence to run is to be found in the *proviso* contained in the preceding section of the statute, and is in the words, "Provided, that such debt or demand shall appear within two years after granting the letters testamentary or letters of administration."

It will be perceived, by reference to the terms of this late proviso, that if this section of the act be strictly construed, according to its letter, the bar of two years will be made to commence running from the date of the grant of the letters testamentary or of administration. We are not aware that the question arising upon this clause of the statute has heretofore received an authoritative adjudication, and as it legitimately arises in this case and may be of frequent occurrence, we deem it a fit opportunity to rule upon it. The law was made to subserve the cause of right and justice by facilitating the speedy settlements of estates and by preventing the enforcement of stale demands. It

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never was intended to be made the engine of oppression, or to work hardship or injury to any one. To interpret it according to its strict letter would be to give it an operation harsh in the extreme, and in the hands of a shrewd and unscrupulous man, it might be made to defeat the most righteous and equitable demands. We are rather inclined to interpret this clause according to its spirit and evident intent, and therefore hold that the bar of the two years will begin to run from the expiration of the four weeks limited for the publication of the notice.

No question was made at the hearing in respect to the sufficiency of the terms in which the notice was couched, and, without intending to rule anything on that point, we will take occasion to remark that the notice should be ample and full in its terms, and should particularly state the limitation of "*two years*" as the period within which the claims are to be presented. In making this remark, we do not intend to be understood as coming in conflict with the case of Filyaw and wife vs. Laverty, (3 Fla. R., 72,) where this point, as to the sufficiency of the notice in this respect, was expressly ruled, but we only desire to call attention to its importance, that the construction of the statute may be such that it may be made to subserve its legitimate end and object, to wit: of furnishing full and ample notice to those who may have just claims or demands against the estate.

The material point argued at the hearing, and upon the adjudication of which this cause must mainly depend, involves the question as to the sufficiency of the presentation of the claim sued upon, to the administrator. There is no evidence of an actual presentation, nor is it pretended that such a one was ever made. But it is contended by the counsel for the plaintiff that the claim ought not to be barred, on two grounds: first, that the suit

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had been pending continually from and before the death of the original defendant, and that this circumstance brings it within the doctrine of *lis pendens*, and consequently dispenses with the necessity of an actual presentation; and, secondly, that under the ruling in the case of Filyaw and wife vs. Lavery, the several orders for the revival of the suit against the administrator was equivalent to an actual presentation.

We are not prepared to adjudicate the first point above indicated, nor, from the view which we have taken of the second, do we deem it essential that we should do so.

Against the second position assumed by the counsel of the plaintiff, it was insisted for the defendant, that as there is no evidence going to show that the writs of *sci. fa.* had ever been issued by the clerk in compliance with the several orders which had been made prior to that made on the 25th day of March, 1854, and, if issued, that the evidence is lacking to show that they, or either of them, had ever been served on the defendant, the mere entry of the order on the minutes of the Court did not bring the case within the ruling of the case above cited. In that case the Court say: "As to the question, what shall constitute an exhibition of a debt or demand against an estate, we think there should be actual presentation of the claim within the time prescribed, or something done by the party equivalent to it." \* \* \* "The party holding the claim or demand must pursue some measure to present his demand, and not remain passive or sleep upon his rights. The bringing a suit or action at law or in equity we would regard as equivalent to an actual presentation."

We see no reason to question the soundness of these views, and, applying them to the case before the court, it is difficult to perceive how it can be withdrawn from their

operation. Under our statute, the filing of the "*praecipe*" is declared to be the commencement of a suit. Now, the *praecipe* is only an *order* to the Clerk to issue the *summons ad respondendum*, and if that is held to be equivalent to and dispenses with an actual presentation of the claim, why shall not the order for a writ of *sci. fa.* have the same effect? In the opinion before referred to, the court very happily says, the party "must not remain passive or sleep upon his rights," and we may appropriately add, that the spirit of the law requires only that the claimant should exercise due and proper diligence in giving notice of his demand to the representative of the estate. It is true, that in the absence of proof that due diligence had been exercised, or where there is ground to suppose that notice of the demand had been intentiontionally suppressed, the court would not hesitate to enforce the bar. But where it is made manifest, as in this case, that the claimant has exercised the utmost diligence, by demanding continuously from term to term the process of the court, we think it would ill comport with justice and equity that he should be barred of his just rights by too rigid an adherence to the letter of the law.

Upon a full review of all the points presented by the record, we are of opinion that there is no error in the judgment of the court below—therefore the judgment is affirmed.

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Pearson vs. Grice.—Statement of Case.

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JOHN W. PEARSON, APPELLANT, VS. JOSEPH GRICE, AP-  
PELLEE.

1. A charge is not proper for detention of a vessel to take on board freight where the charter party provided for its being taken free.
2. Where there is a confused statement in the bill of exceptions as to the rejection of material and important evidence, leaving it in doubt whether the same was actually rejected, the Court will award a new trial.
3. The rule for the calculation of interest in *Dorman and Hart*, 2 Florida, 448, held inapplicable to accounts, with mutual credits, between merchant and merchant.
4. In case of the Circuit Judge not remembering as to the admission of evidence about which there is doubt, means should be taken to ascertain the truth, if practicable, by examination of witnesses or other appropriate mode.
5. The Court will not receive the transcript of a record badly made out, with interlineations, but will require a new and complete record.

This case was decided at Jacksonville.

This was an action of assumpsit, instituted by Joseph Grice, a commission merchant in New York, against John W. Pearson to recover the balance of an account claimed to be due for commission, advances and interest thereon in the purchase of merchandize, sale of lumber and chartering of vessels.

Annexed to the declaration is a bill of particulars dated 19th March, 1853, embracing amounts advanced for merchandize purchased and interest thereon from date of purchase, amounts advanced on drafts of defendant, with interest on each item, commissions at 2 1-2 per cent. for accepting and advancing, and including an item of \$31 as cash paid for the detention of the schooner Cherokee. The defendant Pearson is credited in this account with amount sales of lumber at different times and interest on the

amount of each sale, leaving a balance claimed to be due the plaintiff of \$2,985 13.

The defendant pleaded non-assumpsit, and set-off for lumber sold and delivered to the plaintiff.

The plaintiff's counsel read in evidence sundry invoices and bills of lading of goods purchased for defendant, and also a letter of defendant, dated 12th December, 1850, directing plaintiff to send him a vessel to load with live oak and cedar on the St. Johns river, and also requesting that sundry articles of merchandise specified, be sent to him. The plaintiff's counsel also read in evidence sundry drafts drawn on him by the defendant; also the charter party of the schooner Cherokee, then lying in the port of New York, dated 10th May, 1851, executed by the master of said schooner and the plaintiff, in which it was stipulated, among other things, that the said vessel was to take a cargo of cedar from the mouth of the Ocklawaha river, on the St. Johns river, to New York, and that 10 days were to be allowed to discharge and receive cargo at Ocklawaha river; and, in case the vessel should be detained, demurrage was to be paid at the rate of twenty dollars a day. The master also engaged to take and receive on board said vessel during the aforesaid voyage all such lawful goods and merchandise as the party of the second part, or his agents, might think proper to ship. It was also understood that the vessel was to take out the charterer's freight free.

Defendant's counsel objected to the item in the plaintiff's bill of particulars for amount paid for detention of the Cherokee in New York, as the charter party did not call for such demurrage. The Court overruled the objection to said item, and defendant excepted.

Plaintiff's counsel then offered Samuel B. Grice as a witness, who testified that he was acquainted with the

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custom in New York as to delaying vessels. It is always the custom to pay for detention of vessels like this. That they do not authorize under a charter for return freight, outward freight. The witness also testified that it was and always had been the uniform custom of plaintiff to charge interest on amount of invoices from their date; that witness had at one time presented an account to defendant, containing a charge of interest in this manner, which was settled by defendant.

The record states, that "the plaintiff's counsel then offered in evidence the following account current, produced by defendant under notice, which was read to the jury as follows, to wit: This account current, dated 14th January, 1852, is not to be found on the file."

Plaintiff's counsel read in evidence an account current between the parties, produced at the trial by defendant under notice from plaintiff, commencing 7th June, 1851, with a balance, as per account rendered of \$5,512 99 and interest upon it, and containing other items for advances and interest and commissions, crediting amount sales of lumber and interest, and ending 31st December, 1851, with a balance in favor of plaintiff of \$5,513 37.

Plaintiff's counsel also read in evidence another account current, beginning January, 1852, with the balance of \$5,513 37 from last account, and interest thereon, and containing other items for advances and interest and commissions, crediting amount sales of lumber and interest, and closing 30th October, 1852, with a balance in favor of plaintiff of \$3,569 20.

The defendant's counsel read in evidence sundry accounts of sales of lumber made by plaintiff for his benefit which are unnecessary to be inserted to elucidate the points involved in the decision of the court.

The court below charged the jury, "that in construing

the charter party in evidence, the Court was of opinion that the charter party did not require the vessel to take an outward cargo, and that in taking an outward cargo they did so as a matter of favor. If, therefore, the jury should believe from the evidence that said vessel was detained at the request of plaintiff to take an outward freight, being the goods ordered by the defendant through said plaintiff, and for which demurrage was charged and paid, and that said charge was made according to the usage and custom of commission merchants in the city of New York, then the plaintiff is entitled to recover such items thus paid."

"As to the interest on charges paid out by plaintiff and moneys paid by defendant on credit, the plaintiff is entitled to interest on such sums as you may allow as paid out by him from the date of the payment, and on credits the defendant is entitled to interest on the sums paid to plaintiff from the time they were paid." Also. "If you find from the evidence that the charges for interest on bills ordered are according to the usage and custom of commission merchants in the city of New York, and according to the usage and custom of the plaintiff, and the plaintiff had no funds in his hands of the defendant to pay for said goods, then the plaintiff is entitled to recover the interest according to said usage or custom; but if you find that when said goods were ordered the said plaintiff had in his hands sufficient money of the defendant to pay for the same, then the plaintiff is not entitled to interest for advancing on such bills thus ordered.

The jury returned a verdict in favor of plaintiff for \$2,217 04, and on the following day the defendant's counsel moved for a new trial, assigning among others as a ground for the motion, "that several of the accounts current and account sales rendered by the plaintiff to the de-

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*Pearson vs. Grice.—Statement of Case.*

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fendant offered and read in evidence before the jury at the trial, were omitted, and not sent before the jury with the other papers, and they thereby had not all the data upon which to find a verdict."

The following statement in reference to this point is contained in the bill of exceptions, viz: "During the argument upon this motion for a new trial it appeared by the statement of the counsel for defendant that the following papers were produced by them with the other papers at the trial under the general notice from plaintiff's counsel to produce all accounts rendered by the plaintiff to the defendant; that portions of them were never read to the jury and commented upon by the defendant's counsel, though not endorsed by the court, read in evidence. The following four papers were presented in the motion for a new trial and endorsed by his honor Judge Forward as follows: This paper was presented on the motion for a new trial and contended by counsel that it was in evidence and did not go to the jury, as it is not marked read in evidence, and the court has remembrance of it, held it was not proper it should have gone to the jury."

The papers referred to in the foregoing statement are, a letter from plaintiff to defendant, dated 22d January, 1853, in which he states that he had forwarded to T. O. Holmes a duplicate of an account which he therein encloses to defendant, showing a balance in favor of plaintiff of \$1,870 88. "It also," he says, "gives explanation of account of previous dates;"

Account sales live oak received per brigs Adelina and Sampson, showing net proceeds to credit of defendant of \$1,870 34 of date of 29th October, 1852;

A corrected statement of account, signed by plaintiff, dated 30th October, 1852, making a balance in favor of plaintiff of \$2,830 52. This statement charges error of

\$383 51, doubly credited to defendant in former accounts, and credits defendant for a like error of \$1,122 19;

An account commencing January 18th, 1851, for invoices of merchandise and cash advances, crediting defendant with sales of lumber, and ending 7th June, 1851, with a balance in favor of plaintiff of \$5,515 99;

A statement appended of live oak on hand, showing a total of \$4,035 7-12 feet;

Also a letter from plaintiff to defendant, dated 7th June, 1851, referring to the last-mentioned account and statement of live oak on hand.

The court overruled the motion for a new trial and defendant appealed.

*Felix Livingston* for appellant.

*Sanderson & Forward* for appellee.

BALTZELL, C. J., delivered the opinion of the Court.

This is a suit instituted by Grice, a commission merchant of the city of New York, against the defendant Pearson to recover the balance of an account for commissions, advances, &c., in the purchase of merchandize, sale of lumber, &c.

The errors complained of are to instructions given to the jury and the refusal of the Court below to award a new trial.

The first instruction assigned as erroneous is an item of \$31, claimed to be due for detention of the Cherokee. The Court charged the jury, that if this vessel was "detained at request of plaintiff to take an outward freight, being the goods ordered by said Pearson through said plaintiff, and for which demurrage was charged and paid, and that said charge was made according to the usage and custom of merchants in the city of New York, plaintiff

was entitled to recover;" and further, that "the charter party did not require the vessel to take an *outward cargo*, and that in taking it they did it as *matter of favor*."

The transportation from Florida to New York of a cargo of lumber was undoubtedly the principal object in contemplation of the parties, as the vessel was chartered "for a voyage from the Ocklawaha river, on the St. Johns river, to New York," yet there was an engagement "to take and receive on board the said vessel during the aforesaid voyage all such lawful *goods* and *merchandise* as said Pearson may think proper to ship; and, *further, it was also understood the vessel is to take out the charterer's freight free*." She was, at the date of her charter party, in the port of New York, and did take out freight of defendant to Florida, for the detention of taking which on board this charge of \$31 was made. We do not concur in the opinion that the taking such cargo was matter of favor, but on the contrary, are of opinion that it was expressly provided for by the agreement recited. Being the duty and obligation of the vessel to take such cargo, it follows that there was no rightful charge for the time consumed in taking it on board. Had there been a detention beyond this, through some default of the defendant, then indeed there might have been ground for claim to remuneration. But, nothing of this kind is either alleged or proved, nor do we think that the opinion of a witness that there was a custom in the city of New York to make a charge under such circumstances entitled to any weight. There was just as much reason for charging for the freight taken on board and conveyed to Florida, yet there is none for this, showing the full understanding of the parties as to their liability and obligation. This instruction, then, we think erroneous, and the jury should have been informed that a detention of the vessel to take an outward freight of de-

fendant was not a fair charge by the agreement, and plaintiff was not entitled to the sum paid therefor.

The instructions as to interest form another subject of complaint. They are, "that plaintiff is entitled to such sums as you may allow to be paid out by him from the date of the payment, and on credits the defendant is entitled to interest on the sums paid to the plaintiff from the time they were paid."

Again, "if you find from the evidence that the charges for interest on bills ordered are according to the usage and custom of commission merchants in the city of New York, and according to the usage and custom of the plaintiff, and that the plaintiff had no funds in his hands of the defendant to pay for the said goods, then the plaintiff is entitled to recover interest according to the said usage and custom; but if when the goods were ordered plaintiff had in his hands sufficient money to pay the same, then plaintiff is not entitled to interest for such advances."

We do not regard the first instruction so objectionable as it has been presented in argument by counsel for defendant. In the case of Reid's adm'r vs. The Rensselaer Glass Factory, the Court ordered "the calculation to be made by allowing interest on the receipt and advances of cash from the time of making and receiving the same."—3 Cowen, 438.

This was a case of agency in which there was a receipt and disbursement of sums amounting to upwards of \$100,000, as well on the debit as on the credit side. It is a leading case on the subject of interest, was argued with masterly ability in both the Supreme Court and Court of Errors in New York, and the opinions of the court present an able examination and analysis of the entire subject and of all the authorities, English and American.—3 Cowen, 394; 5 *Ibid*, 558.

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The second instruction makes an exception in favor of defendant somewhat inconsistent with the rules established by the first, and greatly in favor of defendant, and which should relieve them both from all objection on the score of prejudice to him. We do not regard the case of Dorman and Hart, 2 Florida, 447, as having an application to this case. That was the cause of payments on a note of hand, the rule affecting which is settled by a series of decisions on its own foundation. Whilst of this opinion, we perceive a difficulty in the application of the instructions to the facts, the evidence in the cause. In cases of this kind, the accounts furnished to a party, if received without objection and acquiesced in, becomes a stated account, are evidence in favor of a creditor and regarded as conclusive, unless some fraud, mistake, omission or inaccuracy is shown. In this case an account commencing 7th June, 1851, with a balance of former account of \$5,512 99 and interest upon it, and other items giving a balance of \$5,513 37 to the 31st December of that year, and another account, with a like balance of \$5,513 37, with interest upon it, and other items, and closing with a balance of \$3,569 20 on the 30th of October, 1852, together with other testimony, as well on the part of plaintiff as defendant, were given in evidence to the jury. Now, an instruction to allow interest on sums paid and received from date of payment, would seem to be at variance with a settlement in which interest has been calculated on the balances, and not on each item. It is obvious that the instructions given were predicated upon the bill of particulars, and not upon the accounts which were in evidence.

Concluding to reverse the case, we yet do not feel at liberty to declare what should be the true rule as to interest in the event of a farther hearing. This will be more appropriately done when the entire testimony is before us.



The reason of this will be obvious in noticing the application made for a new trial. The following statement as to this point is in the bill of exceptions: "During the argument upon this motion for a new trial, it appeared by the statement of the counsel for defendant that the following papers were produced by them, with the other papers at the trial, under the general notice from plaintiff's counsel to produce all accounts rendered by the plaintiff to defendant; that portions of them were *never* read to the jury and commented upon by defendant's counsel, though not endorsed by the court, read in evidence. The following four papers were presented on the motion for a new trial, and endorsed by his honor Judge Forward as follows: 'This paper was presented on a motion for a new trial, and contended by counsel that it was in evidence and did *not go to* the jury, as it is not marked read in evidence, and the court has [no] remembrance of it, held it was not proper it should have gone to the jury.'"

It is difficult to arrive at the meaning of this very confused and obviously incoherent statement. Perhaps we may infer that the counsel insisted that the papers alluded to were read in evidence, whilst the judge had no remembrance of it. If this be so, we are clearly of opinion that means should have been taken by the judge to refresh his memory by ascertaining the fact asserted, whether the papers were in fact either read in evidence or not read. The important rights and interests of the parties should not be made to depend upon mere remembrance, whilst there is a possibility of attaining the truth by other means. The statement, on its face, shows either mistake or misconception. The papers alluded to are, a letter of Grice, the plaintiff, to Pearson, dated 22d January, 1853, stating that he "had forwarded a duplicate account showing a balance in his favor of \$1,870." "It also," he says, "gives

explanation of account of previous dates;" account of sales live oak of brigs Adelma and Sampson, giving net proceeds, \$1,870 34, of the date of 29th October, 1852; a *corrected statement*, dated October 30th, 1852, making balance in favor of Grice of that date \$2,830 52, and admitting error to his own prejudice for double credit of \$383. 51, and a like error, to injury of defendant, for like mistake of \$1,122 19; an account commencing January, 1851, and ending 7th of June, showing a balance of \$5,175 99 in favor of plaintiff, and account of live oak and a letter dated 7th June, 1851, from Grice to Pearson. That these papers should have gone to the jury, that they were important, material, we would almost say indispensable, to a true understanding and rightful disposition of the case, we think is manifest upon the slightest inspection. The account of January and June, 1851, the commencement of the transaction, should have been given in evidence as part of the plaintiff's case and was necessary to its proper comprehension. The admission of errors by plaintiff in the corrected account of October 30th, 1852, by which the original of the same date, giving a balance of \$3,569. 20, read as evidence by plaintiff, was reduced to \$2,830 52, and again, the letter of the 22d January, 1853, by which the same account was admitted to be farther reduced, through mistakes, &c., to \$1,870 88, exhibit causes for their production on the trial too palpable to require argument in their support. If omitted through inadvertence, accident or mistake, there is no reason for refusing the application, so as to have their production on another trial. Counsel seem to have been so confident of their having been used upon the trial, and of their having been read in evidence, that, on the application for a new trial, they state "that several of the accounts current and account sales rendered by plaintiff to the defendant *offered* and read in

evidence to the jury at the trial, were not sent before the jury with the other papers." If not read, excuse would have been made for the omission. Under such circumstances, we feel no hesitancy in saying that a new trial should have been awarded.

Whilst we have treated these papers as in the record, on the motion for a new trial, for very obvious reasons we have not been permitted to regard them as a part of the record for purpose of reversal, or to predicate instructions upon them with a view to a new trial.

Under the circumstances, we have concluded it most appropriate not to anticipate the action that may be taken in the court below, or even to assume that these accounts and letters will be read in evidence, and, on this account, do not give instructions on the subject of interest. The effect which these errors may have upon the allowance of interest, indeed the effect of the statement of interest in the accounts, has not been argued before us, so as to enable us to consider it with due regard to the rights of the parties.

It is proper to say, that the record states that "the plaintiff's counsel then offered in evidence the following account current, produced by defendant under notice, which was read to the jury as follows: This account current, dated 14th January, 1852, is not to be found on the file."

We have to notice, not only this omission to take care of the papers on file, but are pained to state that the bundle sent us as a record or copy of the proceedings in the court below, is very far from what the law requires from the clerk in the performance of such a duty. But for the aid of our own clerk, in giving us an entirely new copy, it would have been nearly impossible, from the very

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Merritt and Wife vs. Brantley et al.—Statement of Case.

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poor and imperfect specimens sent us, to make out the action of the court below. If the paper had been seen in time it would have been rejected, as no such record will be placed or tolerated among our files.

The judgment of the Circuit Court will be reversed and set aside and the cause remanded for a new trial, and other proceedings to be had in the case not inconsistent with this opinion.

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ETHINGTON J. MERRITT AND ELIZABETH, HIS WIFE, APPELLANTS, VS. BARTHOLOMEW BRANTLY ET AL., APPELLEES.

A will by a testator devising "to his wife, her heirs and assigns, all the property, goods, chattels, rights and credits of which he may be possessed for and during her natural life, except as hereafter provided," and that provision was to pay \$2,000 to his nephew and relative, confers the absolute estate and interest in the wife, subject to the proviso.

This case was decided at Marianna.

In May, 1847, John Brantly, father of the appellees, died in Jackson county, Florida, after having first made his last will and testament, in which, after providing for the payment of his debts, he makes the following provisions, viz:

"I give and bequeathed unto my dearly beloved wife, Elizabeth Brantly, her heirs and assigns, all the property,

goods, chattels, rights and credits of which I may be possessed for and during her natural life, except as hereafter provided."

"I give and bequeath to my relative and friend, Dolphin Drew Rawls, the sum of one thousand dollars, to be paid out of my estate after my wife Elizabeth shall have departed this life or again marries."

"I give and bequeath unto my nephew, William R. Brantly, the sum of one thousand dollars, to be paid out of my estate after my wife Elizabeth shall have departed this life or again marries."

James L. G. Baker and Frederiek R. Pittman were appointed executors of said will, who, on the 20th October, 1853, were discharged as such executors, after fully administering the estate which had come to their hands and delivering to said Elizabeth, the widow of said John Brantly, deceased, the property bequeathed to her by the said will.

On the 23d day of December, 1852, the said Elizabeth, widow of the said John Brantly, deceased, intermarried with the said Ethington J. Merritt, the appellant.

The appellees, who were the complainants below, filed their bill against the appellants, in which they allege that they are the sole heirs at law of the said John Brantly, deceased; that, by the terms of the said will, the property of the said John Brantly, deceased, was to be held and enjoyed by the said Elizabeth Merritt, formerly Brantly, only during her natural life; and complainants contended, that insomuch as there is no limitation over of the said property in said will, they are and would be entitled to the same as heirs at law of said John Brantly, deceased, in case they or either of them should survive the said Elizabeth. Complainants charge, that large amounts of money have been received by defendants on promissory notes,

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judgments and other evidences of debt which had been of the property and estate of John Brantley, dec'd, and after his death were delivered to the defendants, and that owing to the convertible nature of money, and its liability at all times to loss by mismanagement, waste, pecuniary misfortune and other causes, said fund may not be forthcoming to answer the demand of complainants, in case they or either of them should survive the said Elizabeth; and they have reason to fear and do apprehend that the principal of said fund and the other property may be lessened, disposed of or so changed as not to be available in case of the decease of the said Elizabeth. The bill concludes with a prayer that the defendant may set forth a particular account of all the goods and effects, moneys and credits and all the estate of John Brantley, deceased, which may have come to their hands, and how the same has been invested, and that a receiver may be appointed to take possession and control of all the money, promissory notes, &c., which may be in the possession of the defendants, and safely invest the same, paying the interest to the defendants during the lifetime of said Elizabeth; and that the defendant, Ethington J. Merritt, may be decreed to enter into bond, with sureties, conditioned that all the property which had belonged to John Brantley, deceased, and which may have come into his hands, possession or control, (except what may be ordered into the hands of a receiver.) shall be forthcoming after the death of said Elizabeth, and that an order be passed forbidding the defendants from removing the property beyond the jurisdiction of the court.

The defendants demurred to the bill of complaint, which demurrer was overruled, and defendants appealed.

*A. H. Bush* and *C. C. Yonge* for appellants.

*W. E. Anderson* for appellees.

BALTZELL, C. J., delivered the opinion of the court.

This is a bill in the nature of a *quia timet*, filed by the heirs of John Brantly, asserting an interest in his estate and claiming that it be preserved for their benefit.

Whether they have an interest depends upon the construction to be given to his will, which, excluding the formal parts, for the payment of debts and the appointment of executors, is in these terms:

"I give and bequeath unto my dearly beloved wife Elizabeth Brantly, *her heirs and assigns*, all the property, goods, chattels, rights and credits of which I may be possessed *for and during her natural life*, except as hereafter provided."

"I give and bequeath to my relative and friend, Dolphin Drew Rawls, the sum of one thousand dollars, to be paid out of my estate *after my wife Elizabeth shall have departed this life or again marries*."

There is another bequest, giving the same sum to his nephew William R. Brantly, in the precise language of the preceding one.

If Brantly gave his wife a life estate only in the property, leaving the fee or absolute interest undisposed of, in which event his heirs at law would take, then they may maintain their suit, and the decision of the Court below in their favor was right.

If this be the fair import of the will, it must be in the clauses quoted, which are not very obscure, and may, perhaps, be better understood by rejecting expletives and general expressions, so as to throw the three clauses into one thus: I give to my wife, *her heirs and assigns*, all the

property of which I may be possessed *for and during her natural life*, EXCEPT that I give to my relative Rawls and my nephew Brantly the sum of \$1,000 each, to be paid after my wife shall have *departed this life or again marries*.

There can be but little doubt, we think, that the testator designed to dispose of his entire estate, so as to leave no residuum; that he gave it all to his wife and his two relatives; that the bequest to his wife was of the absolute interest in the personalty—of the fee in the realty, subject to the payment of these two sums. He “gives all his property” “to his wife, her heirs and assigns,” except \$2,000.

The only objection to this construction arises from the words, “during her life” in the bequest to the wife, about which there can be but little difficulty, as their force and effect in such connection has been long since declared, by high judicial authority, in the case of Doe ex Dem., Cotten vs. Stenlake, where the devise was to one and her heirs during their lives, in which the Court said, “the words during *their lives*, after the devise to the *daughter and her heirs*, are merely the expressions of a man ignorant of describing how the parties whom he meant to benefit would enjoy the property; for, whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives.” 12 East, 515. This ruling has never been questioned and has our entire approval.

If these words have no force in such a case, what is due to them in one like the present, when attached to and connected with expressions of more decided import, giving a different meaning to them and restricting and qualifying their usual sense and acceptance? “For and during natural life” are attached to the bequests for the payment to the nephew and relative and qualified by them. It is

seen that the payment of the \$2,000 is made to depend upon the marriage of the wife or her death, and she has since intermarried with defendant Merritt, so that the contingency has happened upon which these legatees are entitled to their portion. If such a result follows this act, would not the other follow by the construction contended for, to-wit: the vesting the property absolutely in the heirs, for the marriage and death of the wife are the two events on which a change is to take place in her interest, and these are inseparable in their connection, yet no such position is assumed by the bill or in argument before us. It is not, then, that the property is to go to his heirs on her death or marriage, but a payment of \$2,000 to be made on the occurrence of each event.

But, aside from all authority and precedent and from this view; where is the pretence for saying that by this will these complainants are entitled to all the property of this estate in absolute right, except an uncertain life interest of the wife and the payment of \$2,000 to two other relatives? There is none, not the slightest. If such a result were attained, it would be, not through the will and in compliance with its clear and manifest design, but in direct opposition to it. To produce such result, the testator should have said, (directly the reverse of what he has said,) I do not give to my wife all my property, nor to her heirs and assigns, but I give to my brothers and sisters all my property, to their heirs and assigns, subject to a life estate for my wife. This is what he would have said, if he designed making a will such as they claim he has made, to give them the property. So far from saying this, he declares expressly that others are, and they are not, to participate in his estate—not to be the recipients of his bounty. Should they succeed in obtaining it, then, as we think, it will be not through any will of his, but through

a mistake of his scrivener in the use of words contravening his expressed wishes. But we really have not been able to perceive, in the use of these words, contrariety or opposition or conflict. There is but a mere expression of a wish that the wife shall have the property for her life and enjoy it during that time. They are in harmony with the larger estate interest. The estate in fee includes the life estate and all minor interests, a term for years in reversion or remainder, and it is inconceivable how the mere mention of any of these in connection with the fee should reduce the larger estate to the dimensions of the smaller. If a different estate or interest in some one else had been created—something to divest the interest already clearly vested in the wife—there might have been ground for contest; but there is nothing of the kind in this will.

We then think the court below erred in decreeing the defendants to answer and overruling their demurrer.

The decree of the Circuit Court will be reversed and set aside, and the cause remanded, with directions to dismiss the complainant's bill.

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WILLIAM B. WYNN, APPELLANT, vs. FRANCIS R. ELY  
APPELLEE.

1. Notice of the institution of a suit for foreclosure of a mortgage, is properly executed by handing a copy to defendant.

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Wynn vs. Ely.—Statement of Case.

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2. It is not a good defence to a suit by the assignee of the mortgage, that the assignor was insolvent.
3. Nor that the mortgagor had sold part of the property with consent of the mortgagee or his assignee, without an allegation that the proceeds had been applied to the payment of the mortgage debt.
4. The assignee of the mortgage is by statute the proper person, and has full right to institute suit for the foreclosure.
5. It is not good ground for a continuance, in cases of this kind, that defendant had waited until the issues were joined before getting his witnesses or his evidence for the trial.

This case was decided at Marianna.

On the first day of April, 1853, Wynn, the appellant, gave his promissory note to J. Day & Co., of Apalachicola, for \$7,034 68, and on the same day executed a mortgage on certain negro slaves to secure the payment of said note. Afterwards, J. Day & Co. assigned and delivered the said note and mortgage to Ely, the appellee.

On the 20th day of September, 1855, Ely instituted this suit against Wynn by petition to foreclose the said mortgage.

A notice, dated the 30th day of April, 1856, signed by the Clerk of the Court and by the attorney of the petitioner, notifying the defendant of the filing of said petition, and that the petitioner would, at the next term of the Circuit Court, move the Court for the foreclosure of said mortgage, and for a judgment for the said debt, was served on the defendant by the sheriff on the 6th day of May, 1856, who returned the said notice endorsed, "Executed the within writ by handing the defendant a copy at his residence."

On the 27th day of November, 1856, "came the parties by their attorneys, and the defendant by his attorney excepted to the notice, which exceptions were overruled by the Court."

Upon the affidavit of defendant that he had not the proof to sustain certain credits claimed by him, a continuance was granted.

By leave of the Court, defendant afterwards and on the 26th January, 1857, filed pleas in the following form, viz:

“William B. Wynn, by leave of the Court first had and obtained, comes and makes this his answer to the petition, or so much thereof as he is advised it is necessary to answer, of Francis R. Ely, filed in said Court, to foreclose a certain mortgage therein specified, responds, that he did execute the mortgage to J. Day & Co., as stated in said petition; that respondent was indebted to said J. Day & Co. at the time to the amount designated in said petition and said mortgage, but that it was the understanding between this respondent and the said J. Day & Co., that as this respondent paid sums of money into their hands that they were to credit his mortgage note with the same, which they have failed to do; that said note has no credit upon it for about the sum of six hundred dollars, which was due from the said J. Day & Co., the mortgagees, at the time that said mortgage is alleged to have been assigned to the petitioner, Francis R. Ely, the exact sum this respondent cannot state; that the said J. Day & Co., to whom said mortgage was executed, are insolvent, or so represented to be.

“Your petitioner, further answering, says, that he is also entitled to a further credit upon said mortgage; that, in the spring of 1846, this respondent shipped Jack, one of the negro slaves mentioned in said mortgage, to Columbus, Georgia, with the consent and approbation of said mortgagees, J. Day & Co., and with notice to petitioner Francis R. Ely, who made no objections on his own account to sale of said negro; that said negro slave Jack has been

sold, and this respondent asks that the proceeds arising from said sale may be credited upon said mortgage debt.

"Your respondent, further answering, says, that he is informed, and believes, that the petitioner, Francis R. Ely, is not the absolute owner of said mortgage debt, although the same appears to be assigned to him, but that in reality the absolute ownership is yet in the mortgagees, J. Day & Co.; that the said mortgage debt has been transferred and is held only as collateral security for a large amount of money due from the said J. Day & Co. to petitioner, and that in fact and reality the legal and *bona fide* holders of the mortgage debt stated in the said petition are the mortgagees, J. Day & Co.

"Your respondent further answers and says, that he is entitled to a credit of three thousand dollars, paid upon said mortgage debt to petitioner, Francis R. Ely, on or about the first day of December, A. D., 1855. Your respondent prays, that if the said mortgage in said petition mentioned is held by the said petitioner, Francis R. Ely, merely as collateral security from J. Day & Co. for a debt due from J. Day & Co. to said Francis R. Ely, and that the legal interest to the same is in said J. Day & Co., that the said petition of the said Francis R. Ely be dismissed. He also prays, that in the event your Honor should hold that said petitioner has the right to compel a foreclosure of said mortgage in his own name, that respondent may have said debt credited with the amounts due him from J. Day & Co., the mortgagees, before the same was transferred as collateral security, and with the proceeds of the negro sold in Columbus, Georgia, and with the sum paid Francis R. Ely in 1855, and that the same be referred to a special master to take and state an account of the whole matter touching the credits which

are proper to be applied in payment of said mortgage debt.

WM. B. WYNN.

"Sworn to and subscribed before me, this 26th day of January, 1857.

"L. B. McKINNEY, *Clerk*.

"And, at a subsequent day, the petitioner filed his replication to defendant's pleas in the following words, to wit:

"And the said Francis R. Ely, as to the said plea by the said William B. Wynn first above pleaded, that said Wynn, the defendant, was entitled to a credit of about the sum of six hundred dollars on said note given by said defendant to J. Day & Co. in compliance with an understanding between them, your petitioner says, *precludi non*, because said defendant is not entitled to any such credit in manner and form as stated in said plea, and of this he puts himself on the country, &c.

"And, by way of further reply to said plea, this petitioner avers, that on the fifteenth day of October, 1854, and previously said defendant had notice of said assignment of said mortgage, and this your petitioner is ready to verify, &c.

"And said petitioner, as to the said plea of said defendant secondly above pleaded, to wit: the said J. Day & Co. are insolvent, or so reputed to be, says that he denies that they are insolvent, and of this he puts himself on the country, &c.

"And this petitioner, Francis R. Ely, as to the third plea of defendant, that he is entitled to a credit for the proceeds of negro called Jack embraced in the said mortgage and shipped to Columbus with the consent and approbation of the said J. Day & Co., and with notice to your petitioner, who it is alleged in said plea made no objections on his own account, your petitioner says *precludi*

*non*, because he never gave any consent, directly or impliedly, to the shipment and sale of said negro Jack, and that the same were made without and against his consent, and of this he puts himself on the country, &c.

“And the said Francis R. Ely, as aforesaid, to the fourth plea of said defendant, that said petitioner is not the absolute owner of the said mortgage, and that the said J. Day & Co., are the legal and *bona fide* holders of the same, and that said mortgage was transferred as collateral security to your petitioner by said J. Day & Co., says, *precludis non*, because your petitioner, by said transfer of said mortgage, became and is the legal and absolute owner and possesses all the same means and remedies originally possessed by the said J. Day & Co., and that the said J. Day & Co. are not the legal and *bona fide* owners of the said mortgage, and of all this he puts himself on the country, &c.

“And the said Francis R. Ely, as to the fifth plea of the said defendant, that on or about the first day of December, 1855, the sum of three thousand dollars was paid by defendant to petitioner, to be credited on said mortgage, the said petitioner, F. R. Ely, says that he admits the payment of said sum and agrees hereby that the same shall be credited on said note, debt and mortgage.

“Defendant afterwards filed his demurrer to plaintiff’s application as follows, to wit:

“And the said defendant saith, that the replication of the said petitioner to the first plea of the defendant and the matters therein contained, in manner and form as the same are above replied and set forth, are not sufficient in law for the petitioner to have or maintain his aforesaid action thereof against the said defendant, and that he is not bound in law to answer the same, and shows the court here the following causes of demurrer in law to said repli-

cation—that is to say, that the said petitioner has filed two replications to one plea, and that the second replication to the first plea of defendant does not allege any sufficient answer to the plea of the said defendant; that said replication avers notice, on the first of October, 1854, and previously to defendant, of the assignment of the said mortgage, and this averment, the said defendant says, is not responsive to said plea or any answer whatever to said plea.

“And for demurrer to the third replication, the said defendant assigns the following grounds for demurrer; that it does not allege any sufficient answer to said plea in this, that the replication denies that J. Day & Co. are insolvent when the plea avers that they are reported to be insolvent, and in that it does not fully answer said plea.

“And the said defendant demurs to the fourth replication of the petitioner, and assigns for special cause this, that said replication avoids the issue tendered by defendant’s plea in this, that it does not admit or deny that J. Day & Co. did not consent that the boy Jack should be shipped to Columbus and sold and the proceeds applied to said mortgage debt and said replication does not show that said boy Jack was shipped after the assignment of said mortgage.

“And the said defendant demurs to fifth replication of petitioner, and it is not a sufficient reply in law, and assigns for a cause of demurrer this, that it does not reply issuably to defendant’s plea in this, that the plea alleges that petitioner is not the absolute owner of said mortgage debt, but that he holds the same as collateral security on a large debt due him from J. Day & Co. to petitioner, and said replication does not deny this allegation and does not deny the said assignment was made as collateral security to petitioner on a debt due from J. Day & Co. to peti-

tioner, and that said replication is otherwise defective, informal, and unissuable in many respects."

The court overruled the demurrer to the first and fourth replications, and held that the second and third pleas of defendant were bad under said demurrer. The defendant, by leave of the Court, joined issue with the replication to to the other pleas.

The defendant's attorney, at the same term, applied for a continuance, on the ground that "he could not safely go to trial, because he had not taken the evidence to prove the indebtedness of J. Day & Co. to him before the assignment of the said mortgage, and which is set up in his first plea filed; that he would have taken the evidence of witnesses residing in Apalachicola but for the fact that the issues were not joined and made up until the present term of the court; that the names of the witnesses to prove defendant's pleas were confided to C. C. Yonge, defendant's leading attorney, who was unavoidable absent, and in addition thereto, that the defendant was detained by sickness."

The Court refused the continuance asked for, and a jury being called, who returned a verdict for the petitioner for \$5,328 76, judgment was thereupon entered and for a foreclosure of said mortgage, from which defendant appealed.

*Yonge & McClellan* for appellant.

*A. H. Bush* for appellee.


BALTZELL, C. J., delivered the opinion of the court.

This was a suit for the foreclosure of a mortgage under the statute providing a remedy in such cases.

The objections raised in this court are to rulings of the court below on preliminary points and as to the pleadings.

The first objection is thus stated in the record: "Now at this day came the parties, by their attorneys, and the defendant, by his attorney, excepted to the notice, which exceptions were overruled by the court." In this court exceptions have been taken, as well to the notice as to its service. In neither do we think there was error. The law, which is a peculiar one, directs "personal service of notice of the intention of the party to institute a suit to be served upon the mortgagor." The notice here is signed, as well by the Clerk of the Court as the attorney giving notice of the filing of the petition for the foreclosure of a mortgage, with all necessary precision. We cannot perceive that anything more was wanting, or that anything was not done which the law required. "There was notice of the institution of the suit." The service was, "Executed the within writ by handing the defendant a copy at his residence." This, we think, good as personal service to the party, and preferable to reading without a copy. If defendant had been unable to read, he might have had this done either by the officer or anyone else.

Plaintiff filed objections, which are termed pleas, presenting his defences. There are four of these, on two of which, the first and fourth, issue was joined and a jury found their verdict, which it is unnecessary to notice, as the assignment of errors of the appellant is to the alleged error of the court in ruling the demurrer to plaintiff's replications. The other pleas adjudged bad are the second and third. We have had no little difficulty in ascertaining the different pleas, as they are not separated in such a manner as to be readily distinguished. Which is the second plea is not so manifest. The answer alleges, that defendant was entitled to credits on the mortgage for about the sum of \$600; that Day & Co., the assignors of the mortgage, are insolvent. The replication is, that Day



& Co. are not insolvent. If this be the plea, we have no difficulty in declaring that it presents no defence to the suit. Day & Co. were not the owners or holders of the mortgage; they had assigned and transferred their right and interest to the plaintiff Ely. If they had an equitable claim for a part of the proceeds when collected, provided an amount was received more than sufficient to pay Ely what was due him, how does this affect the defendant's rights, or his defence? It is pretended that he could not safely pay Ely, or that his receipt would not be a discharge. The third plea is, that "he is entitled to a farther credit upon said mortgage; that, in the spring of 1856, this defendant shipped Jack, one of the negro slaves mentioned in said mortgage, to Columbus, Georgia, with the consent and approbation of the said mortgagees, J. Day & Co., and with notice to petitioner Ely, who made no objection to the sale of said negro; that said negro Jack has been sold, and this defendant asks that the proceeds arising from said sale may be credited upon said mortgage debt." No argument is necessary to show that there is not the slightest merit in this plea. If the proceeds of the sale had been paid to Ely, defendant could have plead payment simply, but a sale of part of the mortgage property, without any appropriation of the proceeds to the mortgaged debt, will scarcely amount to a payment. Another assignment of error is that the mortgagees, Day & Co., should have been parties to the suit—the legal interest was in J. Day & Co., and they were the proper parties to commence the suit. The statute under which this proceeding was had is a full answer to this. "It shall be lawful for any mortgagee or mortgagees to assign and transfer any mortgage made to him, her or them, and the person or persons to whom any mortgage may be assigned

may also assign and transfer it, and they and their assigns and subsequent assignees may lawfully have, take and pursue the same means and remedies which any mortgagee can or may lawfully have, take or pursue for the foreclosure of any mortgage and for the recovery of the money secured thereby.”—Thompson Dig., 376.

Now, the record shows that the defendant was not only informed of the assignment, but admitted its validity, by making a payment of three thousand dollars, and by treating Ely as the owner and proprietor in other respects. Nor do we think the application for a continuance better sustained. “He can’t safely go to trial, because he has not taken the evidence to prove the indebtedness of J. Day & Co. to him before the assignment which is set up in his first plea; that he did not take these for the reason that the issues were not joined, stating also that the witnesses reside in Apalachicola.” Now the statute directs the case to be decided at the first term, at which time the issues are to be made up, so that, obviously, the party should have been ready with his proofs. But the character of this payment is not stated so as to entitle it to estimation, nor when or how it was made, through whose agency, whether he had a receipt or not for it, whether it was for money paid or cotton, or what else, is not stated. The plea itself fails to state the exact sum, and gives it as “about \$600.” Nor is the name of the witness given by whom he expects to prove the credit. It is not a little singular, too, that he had a continuance at the previous term of the court for want of proof of this same and other items. Now it would be a most improper and unusual indulgence to be extending continuances thus repeatedly asked for on the same grounds. We think the court below decided rightly in refusing to grant it.

The judgment will be affirmed with costs.

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Abernathy vs. Abernathy.—Statement of Case.

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ISABELLA ABERNATHY, APPELLANT, VS. MEREDITH B. ABERNATHY, APPELLEE.

1. For the removal of a husband as a trustee for his wife by statute, something more is required in consequence of the relation than in the case of an ordinary trustee.
2. In case of desertion by the husband, or of cruelty to the wife, the Court will intercept her estate which may come to his hands or in his possession so as to secure her maintenance and support, and, in such a case, remove him as a trustee.
3. They will not remove him as trustee, in case of desertion of the wife, without cause, although the husband may not have been entirely without fault.
4. The conduct of the next friend of the wife in the case reprehended.
5. The Court should take care that its records should be protected as far as possible from obscene expressions.

This case was decided at Marianna.

Isabella Abernathy, by her next friend Malachi Warren, filed her bill of complaint against her husband, Meredith B. Abernathy, and against the Sheriff of Jackson county, in which she alleges, that in the year 1852 she intermarried with said Meredith Abernathy, in the State of Alabama, of which State they were both residents; that at the time of her marriage she was possessed of four slaves and about \$1,800; that, under the laws of the State of Alabama in force at the time of her marriage, property owned by a woman before marriage is, after marriage, her separate estate, and not liable for her husband's debts, the husband being only the wife's trustee, and liable to be removed from his trust if he becomes incapable or unfit for the discreet management and control of the same; that since her marriage her husband has disposed of and wasted the whole of her separate estate, except one of the negro slaves named Harry, and that, instead of seeking to pro-

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Abernathy vs. Abernathy.—Statement of Case.

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tect and preserve the pittance remaining, he is seeking to have it applied in satisfaction of his debts, and thus throw herself and child entirely upon the charity of her friends; that her said husband, pretending to be indebted to one C. C. Cobb, did, on the 21st November, 1855, confess a judgment in his favor, and that the execution which issued thereon has been levied, with the concurrence and consent of her said husband, on her only remaining negro slave. She further alleges, that her husband leads a wild, roving life, without any fixed occupation or abode, and that, in consequence of his neglect of her and his infidelity and inability to provide for her maintenance, she has been compelled to seek a home amongst her relatives in Alabama. The bill concludes with a prayer for an injunction restraining the sheriff and others from all further proceedings against the said negro slave, and that her husband, the said Meredith B. Abernathy, be ousted of and from his said trust, and that some discreet person be appointed to hold said negro for her as her trustee, and for general relief.

Meredith B. Abernathy, at a subsequent day, filed his answer to said bill, in which he admits the marriage in Alabama, and that she was possessed of the property set forth in the bill, but denies that the law of Alabama, as set forth in the bill of complaint, has any reference to him. Defendant also admits that he has disposed of all the property except the negro slaves referred to, but denies that the same has been wasted.

The defendant in his answer proceeds:

"The said property was disposed of under the following circumstances: About the 1st of January, 1853, this defendant, in company with his wife Isabella, with said slaves Harry, Rachel, Nancy and Ellen, started to remove from the State of Alabama to the State of Texas, and at

the close of the first day's travel this defendant was induced by the entreaties and persuasions of his said wife Isabella, to exchange said negro woman Rachel and her two children Nancy and Ellen, with one Tillman, who resided in Lowndes county, Alabama, for a negro girl named Ann, who was represented to be sound, healthy and a valuable house servant. The said complainant (Isabella) represented to this defendant that she was utterly ignorant as to the duties of house-keeping; that said negro woman Rachel could be of little or no service to her in keeping house and was very anxious that the exchange should be made. This defendant further states, that a short time after their arrival in the State of Texas said negro girl Ann proved to be seriously diseased, so much so that she was almost entirely worthless; that as soon as this fact was ascertained, this defendant started back to Alabama with said negro girl, and proposed to return her to said Tillman, on the ground of the false representations as to her unsoundness, but learned that said negro woman Rachel and children had been mortgaged by said Tillman to secure a large debt, and this defendant being unable to prove the false representations of said Tillman, so as to recover said negroes by legal process, was induced, as a last resort, to exchange said girl Ann with a negro speculator for a negro girl named Malinda; that some months after the return of this defendant the said negro girl Malinda also became diseased, when she was sold for the sum of about six hundred dollars. This defendant further states, that while in Texas he purchased a considerable quantity of land in Louisiana, which he cultivated one year and sold for a sum not now recollected, but considerably less than its actual cost; that he was unsuccessful in farming, though having used every effort in his power to make a good crop; that he was induced to sell said land on ac-

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Abernathy vs. Abernathy.—Statement of Case.

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count of his said wife Isabella becoming so much dissatisfied with the country; that said sum of \$1,800 and the money derived from the sale of Malinda was used in the purchase of said land, in defraying traveling expenses, for goods and necessities of life for himself and his wife Isabella; also a large amount paid to doctors.

"This defendant, further answering, denies that he is now or has been seeking to have the negro man Harry applied in satisfaction of his debts, but that he and his wife Isabella endeavored to execute a mortgage for the purpose of carrying on the grocery business in the town of Marianna; that his said wife was as much interested in the success of the business as this defendant, as it was for the purpose of making a support as well for his said wife as for himself.

"This defendant, further answering, admits it to be true, as alleged in complainant's bill, that on or about the 21st day of November, 1855, this defendant did confess judgment in favor of Christopher C. Cobb for the sum of seven hundred and six dollars, this being the amount actually due said Cobb by this defendant on a settlement had between them in the month of November, A. D., 1855; that execution issued on said judgment, and that the same was levied on said negro man Harry, but not with the consent or connivance of this defendant, who was aware that the absolute title of said negro man was vested in his wife.

"This defendant, further answering, denies that he leads a wild, roving life, without any fixed occupation or abode, and says that he is now and expects to be a resident of the county of Jackson, and is now preparing to engage in the practice of medicine.

"This defendant, further answering, denies that he has at any time neglected his wife, or been unfaithful to her, as stated in said bill of complaint; that such accusation is

utterly false and groundless; that the charge that this defendant was unable to provide for and maintain his said wife is equally untrue; that, in order to prevent his said wife from being dissatisfied, he boarded her at the best hotel in the town of Marianna (while at the same time this defendant cooked his own food at his grocery, in order to lessen the expense,) and when his wife Isabella became dissatisfied with boarding at the hotel, he procured her board at the house of Mrs. Ming.

"This defendant further says, that, during the year 1854, said negro man Harry was hired to Luke Lot to defray the expenses of board of wife, hire of nurse, &c., and hired to Robert Dickson for the sum of two hundred dollars, and that a large amount was used in discharging the store account of the said Isabella.

"This defendant further says, that from the time of the intermarriage with said Isabella to the time of their separation they lived happily together, and that no efforts were ever spared on his part to add to her prosperity and contentment.

"This defendant, further answering, denies that his said wife Isabella was compelled to seek a home amongst her relations and friends in Alabama. This defendant is prepared to prove that this statement is at variance with the truth.

"This defendant further says, that said Isabella was induced to leave him on the urgent and earnest solicitations of said Malachi Warren and others, on false representations and promises; that said Malachi Warren, as this defendant is informed and believes to be true, stated to said Isabella that, unless she returned to the State of Alabama, he (the said Malachi Warren) would kill this defendant; also, that if she would return with him, he would give her all the wealth her heart could desire."

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*Abernathy vs. Abernathy.—Statement of Case.*

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William Yarborough, a witness examined by defendant, testified that the defendant boarded at his house near eighteen months, commencing in June or July, 1855; that he was engaged in reading medicine whilst with him; that he behaved himself gentlemanly; that he is fully qualified to manage a trust estate if he were disposed, and that if he conducted himself as he did at the house of witness, he is fit and capable to manage a trust estate. Witness further declared, that defendant drank, whilst with him, as men drink who drink at all, and did not drink to excess.

Luke Lott, another witness, testified, that he kept a hotel in Marianna; that when he took possession of the house Mr. and Mrs. Abernathy commenced boarding with him. They afterwards left the house of witness and boarded with Mr. Tillinghast, and subsequently returned to the house of witness, and remained there until they left Marianna. In the year 1855, Malachi Warren, her uncle, sent for Mrs. Abernathy to come immediately to see him at the house of Mr. Tillinghast. Witness went over as soon as he could obtain a leisure moment. A note was handed Mrs. Abernathy, after reading which she asked the two Messrs. Warren, her uncle and brother, "if she could go and see him for the last time." The youngest Warren gave his consent, and Mrs. Abernathy walked out of the room and got out into the passage when Malachi Warren called her. Mrs. Abernathy said she would go and see Mr. Abernathy for the last time. Malachi Warren said she must not leave the house, when Mrs. Abernathy said Mr. Abernathy had never given her a cross word in his life, but Malachi Warren would not allow her to go. Mrs. Abernathy was much affected, shedding tears freely. Malachi Warren took her by the arm and rather forced her into the room. Next day Mrs. Abernathy went off with Malachi and the other Warren. Malachi Warren

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Abernathy vs. Abernathy.—Statement of Case.

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borrowed witness' double-barrel shot gun. He said Mrs. Abernathy must not see her husband any more, and that he would take care of her and protect her; that she should not want for anything. Witness hired a negro boy named Harry for about twelve months, amounting to about \$116, which was nearly all paid by Mr. Abernathy to witness for the board of his wife, servant and himself, though he boarded his wife with witness for awhile and he boarded himself at his grocery. He was engaged in keeping a bar. Witness thought him a very kind husband, and too kind for his purse. Thinks Mr. Abernathy liked to drink. Thinks him discreet enough to manage a trust estate, if he will let alcoholic drinks alone. He appeared to be very much mortified at the loss of his wife, and cried like a child.

George W. Tillinghast was also examined, who testified that he knows nothing of the habits of Mr. Abernathy; that, so far as witness knows, his conduct towards his wife was kind; that he came in at late hours, but said business at his shop detained him.

Other witnesses were examined, some of whom declared as their opinion that the defendant was not a fit and discreet person to manage a trust estate, whilst others expressed their ignorance upon the subject, and others again that he was competent. The witnesses speak of his habit of drinking, whilst some of them declared that he was intemperate. Several of the witnesses testified to the declarations of the defendant of his presence at improper places, and to his admissions upon a subject which cannot be introduced by the reporter: The witnesses all declare that the defendant passed and was called by the name of Clark.

The court below enjoined the sale of the negro Harry

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Abernathy vs. Abernathy.—Opinion of Court.

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under the execution in favor of Cobb, and simply directed the sheriff to hire out said slave for the year 1856.

*J. F. McClellan* for appellant.

*D. P. Holland* and *W. E. Anderson* for appellee.

BALTZELL, C. J., delivered the opinion of the court.

This is a suit in chancery, instituted by a wife through her next friend against her husband, seeking to have him removed from the office of trustee in the care and management of a negro man, in his possession in virtue of his marital rights.

In the State of Alabama, where these parties resided at the time of their marriage, the law made him trustee and provided, "that if from imbecility, intemperance or other cause, a husband becomes incapable of or unfit for the discreet management and control of the separate estate of his wife, the wife, by her next friend, may file a bill in chancery alleging the unfitness or incapacity of the husband, and if the allegations of the bill are admitted or established by the proof, the chancellor must decree that the husband shall no longer have any control over the estate of his wife or the rents, issues or profits thereof, and the wife shall have the same control thereof as if she were a *feme sole*."—Code of Ala., 381-'2. There were four negroes, a man and wife and his children, and eighteen hundred dollars in money, received by defendant at the time of his marriage.

The allegations of the bill are, that the husband has "disposed of and wasted the whole of said estate except Harry, one of her slaves, and that he is seeking to have him applied to the satisfaction of his debts, and thereby throw his wife and child entirely upon the charity of her

friends; that he leads a wild and roving life, without any fixed occupation or abode, and that, in consequence of his neglect of his wife, his infidelity to her and his inability to provide for her maintenance, she has been compelled to seek a home amongst her relatives in Alabama."

The allegation of waste is denied, whilst it is admitted that the boy Harry is all that remains of the property. It is unnecessary to recite the answer at length. Suffice it to state, that it explains the sale of the ether negroes and the expenditure of the money as having been occasioned by the purchase of lands in Louisiana, afterwards sold at a loss, in removing to Texas, first subsequently to Louisiana and then to Florida, at the earliest solicitation of his wife, in the effort to make a crop, in the purchase of furniture, payment of board and a large amount of physician's bills.

There is no proof of any act of waste. The main reliance in support of the allegation is placed on the fact that the wife's property has not been increased, but diminished.

It may be admitted, that a man of average capacity, commencing with this capital, might, by prudence, industry and economy, have supported himself and family and gradually increased his original stock. There are few, however, succeed to this extent, especially a young couple, in the that season of extravagance, of high hopes and delusive expectations; nor would it be perfectly fair to apply to such the rigorous rules appropriate to a more advanced age. Indeed, a judgment so rigorous might seriously affect the contract of marriage itself; for, if adjudged incompetent to the management of property acquired through that relation, what is to become of its more delicate duties, its graver, more enlarged and higher responsibilities? Nor is success an unerring test of capacity and worth, any more than failure in the management, or less or deprecia-

tion of property, an infallible indication of unworthiness or incapacity. The most worthy, prudent, careful and economical, industrious and persevering do not always succeed, so that we by no means regard the fact of diminution of property as evidence of unfitness or incapacity, or sufficient cause, on this account, to authorize the removal of such a trustee.

The allegation of defendant's seeking to have Harry applied to the satisfaction of defendant's debts is unsupported by proof. Nor is there proof of the "defendant having led a wild and roving life, without a fixed occupation or abode," unless it be deduced from the fact of his removal already alluded to, to three or four different States. Considering the known habits of our people in connection with the fact that these parties were but recently married, this could hardly be regarded as evidence of recklessness or imprudence, but rather of spirit of enterprise and rightful adventure.

The remaining allegation is, that, "in consequence of his infidelity to her and inability to provide for her maintenance, she has been compelled to seek a home amongst her relatives in Alabama." There is no sufficient evidence of this inability, as it is proved that she was boarded at the best hotels in Marianna, and it does not appear that at any time she was denied or deprived, much less felt the want of the necessities or comforts of life, whilst her husband, in a commendable spirit of economy, denied himself many of these by preparing his meals at the place where he conducted his business.

The charge of infidelity has a better support—indeed the main stress of complainant's case is laid upon it—to prove which some twelve or fifteen witnesses have been examined. We have read their depositions with extreme repugnance, and, we must add, disgust, and will not refer to

their details. They certainly show a looseness of conversation and wantonness on the part of defendant in ill accordance with the chasteness of one holding the relation of a married man. The impression they produced is that defendant indulged in unworthy vamping and indecent boasting on a delicate subject, or was careless in his assertions, or not in a condition to perceive their full purport; for surely no one of ordinary refinement and sensibility could seriously give utterance to such vulgarity. Yet there is no direct proof of criminality, and it can only be inferred from his presence at improper places, and the report of his wild and reckless expressions. Yet, with all this, we are not satisfied that this criminality was the real cause of the separation of the wife, or that it "compelled her to seek a home amongst her relatives." It is scarcely to be presumed that the numerous witnesses examined as to this charge could have been in communication with this lady on this subject before the arrival of her uncle and brother, or that they in the course of a single day of their stay in Marianna, could have been informed of all that these depositions detail, so that this part of the case would seem to have been subsequently procured to justify or excuse her departure rather than to give the true cause of it. There is in the record no satisfactory explanation of this act of abandonment and separation, which seems to us to have been imprudent, precipitate, ill-advised and improper. There is no evidence of conjugal disagreement or altercation, nor the slightest expression of dissatisfaction on her part, nor proof of cruel treatment on his part, nor of such as could fairly be pronounced even ungenerous or unkind. On the contrary, in reply to an injunction of her uncle forbidding an interview before her departure, she makes declarations (adverted to hereafter) decidedly negating such imputation.

It is not under such circumstances that a court of chancery will interfere against a husband in behalf of a wife. We have no decision of the courts of Alabama to aid in the determination of this question, yet with the assistance of the English decisions and the rules and principles prevailing in the courts of equity, we hope satisfactorily to dispose of the case.

"Courts of chancery, in case of the desertion of the wife by the husband, have ordered the income of her property to be paid to the wife till the husband returns to his duty." *Macqueen Hus. and Wife*, 99; 2 *Atk.*, 96; 11 *Vesey*, 12; 2 *Vesey, Sr.*, 561.

"So when a husband, by his cruelty to his wife, forces her to leave him, it will be the same as if he had deserted her.—2 *Vern.*, 93; 2 *Vesey, Jr.*, 198. So the court took cognizance in *Williams vs. Collen*, not only of the husband's cruelty, but likewise of his dissipation, domestic irregularities and improvident expenditure." "It was a case," says the report, "where the husband proved drunken, rude and abusive to his wife, and moreover, wasted his substance in riotous living."—*Macqueen*, 104-'5; 2 *Vernon*, 752.

"These orders for a maintenance are always made with a view to the probable or possible reconciliation of the parties."—*Macqueen*, 106.

These cases afford the best analogies to the case before us, and show a higher object and purpose in the courts than the mere preservation of property—the amendment of the husband, the restoration of proper relations between husband and wife. Hence more leniency should probably be extended to a husband trustee than would prevail in the ordinary case of such relation. It is proper to state that there is an effort to establish other facts—intemperance, unfitness, &c.—but for very obvious reasons, we

cannot regard them in our consideration of the case. They were not put in issue, so that defendant was not called upon to defend himself or disprove them.

We have seen that incontinence or infidelity is the only misconduct established, and the question is, how far this should operate as ground of removal. By the law of Alabama, there must be "imbecility, intemperance or other cause, so that the party becomes incapable of or unfit for the discreet management and control of the property." Now that such action may disturb the conjugal ties and be just ground for complaint for the wife is very clear, yet it is not seen how this is necessarily to affect the management of the property. Certainly no such cause is assigned in the books or treatises. There "the act or omission must be such as to endanger the trust property or to show a want of honesty, a want of proper capacity to execute the duties, or a want of reasonable fidelity."—2 Story Eq., 528. Here there is no unfitness, no incapacity, no want of fidelity, nor of honesty, so that, assuming these to exist, the act of impropriety alluded to could scarcely be regarded as sufficient to require the removal.

There are other objections to this proceeding worthy of notice. For the conduct of suits of this character courts of equity have required the intervention of a third party as the next friend of the wife, usually some near relative. In this case, the uncle of the wife has assumed the office, and, we regret to state, with very inadequate appreciation of its character and responsibility. His first appearance in the record is in soliciting a private and exclusive interview with the wife without the assent or knowledge of her husband, and he then, after exciting her apprehension, prevails upon her to leave her husband and go with him to Alabama, taking with her her child, and forcibly preventing a parting interview with her husband, having

armed himself with a gun as a means of menace or defence, or probably intended for use in case of an attempted rescue. Influences so improper and malign—acts and conduct of such injustice and wrong, so palpably violative of all law, both human and divine—an invasion so manifest of the nearest, dearest, most delicate and interesting ties, of the two most important and sacred of all human relations, husband and wife, parent and child, may, in an extreme case of cruelty and oppression, be justifiable, but in the case presented by the record, admit of no excuse. Even with the utmost rigor of judgment upon the conduct and conversation of the husband, which, so far from being disposed to extenuate we have already characterized in terms of reproof, we perceive nothing to prevent amendment and reformation, but, on the contrary, much to encourage the hope of a returning sense of self-respect on the part of the husband and a due appreciation of domestic ties and obligations, such as serious reflection, with the advance of mature age, may gradually effect. He has engaged in the study of medicine and has gained the testimony of his preceptor to his steadiness and moral worth. The language of his wife, in the moment of separation, too, speaks volumes in his favor. “She started to see him, when her uncle took her by the arm *and forced her into the room*. It was then she said, shedding tears freely, *‘he never gave me a cross word in his lifetime.’*” A witness, being the proprietor of the hotel where she boarded says: “He was a very kind husband to her, and too kind, I thought, for his purse. He appeared to be very much mortified at the loss of his wife, and cried like a child.” The keeper of another hotel where she stayed says, that, “as far as he heard, defendant was kind.” Other witnesses depose to the same conduct, and there is but one of the large number examined, who says that

“his conduct to his wife was in some respects bad.” Where then is there any just ground for saying that such a man deserves the punishment of the vilest criminal, nay, a worse fate, for to him even is not denied the solace of a faithful and affectionate heart. From a prospect and position so hopeful and encouraging—a duty so solemn, engaging and imperious, exacted by obligations of the highest character and having their foundation in the very innermost recess of our nature, the wife is enticed to a position of dependence, poor and miserable at the best; her peace, quiet of conscience, true happiness bartered for luxury, nay more, her allegiance to her husband thrown off and open disobedience avowed—seduced to yield herself to the counsels and directions of her husband’s enemies—her society, her kindly aid and assistance in his struggles to advance their common fortunes withheld from and denied to him and given to them. Instead of trying to relieve her husband from his faults and follies by her kindness, gentleness and those graces of the female character which Providence has given the gentler sex—not for ornament, but as a means of good—she is prompted to and withdraws from him this main support, this principal reliance in his difficulties, so that, if he escapes ruin, it will be in spite of and independent of her aid and assistance.

Nor is this all. There are other consequences involved in this rash act. There is a child, to whom the father, as well as the mother, owes obligation and has corresponding claims—the duties of nurture, maintenance, counsel and protection and the claims of paternal upon filial affection. By this separation, one parent, the head of the family, is at once debarred and cut off, and who will say that an adequate substitute is provided? Who shall fulfill, in either

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Abernathy vs. Abernathy.—Opinion of Court.

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case, the appropriate duties of the most sacred relations? For those to whom either wife or child might look for that which these relations impart and bestow, as well as enjoin, may owe to others in the same relation to them what cannot be divided, apportioned or withheld? Could they give it if these did not exist? The very hope is not only illusive but absurd, if not preposterous. The attempt to supplant nature, to supply her offices or to amend her provisions for accomplishing desirable results in the events and mysterious issues of life, is sacriligious as well as unwise. If the uncle and brother would act the part of real friends, as they profess to be, and the lady that of a true wife, let this unfortunate breach be healed, let the sacred bands entered into between her and her husband and preserved, and let his endeavor to reform, already manifested by this engagement in an honorable profession, be encouraged and his affection for his wife reciprocated, and thus there may yet be a brighter future for husband, wife and child.

It is apparent from the views presented that the uncle of this lady is not, in our estimation, her friend, nor entitled to prosecute this suit in her behalf. A party coming into a court of equity, must come with clean hands. Its portals are not open to one who, by his acts at the very threshold, is a trespasser, with ruthless hand invading the domestic sanctuary. No one who undertakes to excite domestic troubles and destroy domestic peace can hope to assume a position in the Temple of Justice. His conduct in the management of the suit itself is not less objectionable. Questions re propounded by him on behalf of the wife which any woman, possessing the instinctive delicacy of her sex, would blush to hear uttered in her presence—the very recital of which would cover her face with shame and confusion. Nor can we for a moment suppose, from

our estimate of her disposition and character, that this lady could have given them her approval. There is nothing in the record to induce us to believe that she could have desired to instigate such exposure or to spread her husband's disgrace upon the public records, either to gratify resentment, if she had any, or to indulge the prurient curiosity of the vulgar by the perpetuation of a petty scandal. No, we rather believe, for the honor of the sex and her own self-respect, that she would have prevented such a course of enquiry. Can it be believed that the paltry sum at issue, the hire of one negro or his control, could have been on her part the inducement to so perilous an assault? No, we can form no such conclusion; but, on the contrary, are under the impression that the disruption of domestic ties has been on the part of the uncle, the true cause of this suit. The property is protected from sale by the injunction granted. Beyond this, for the reasons stated, we decline further interference.

In reference to the conduct of suits of this nature, we deem it proper to add, in conclusion, that although courts may not refuse to consider details, however offensive and disgusting, when such become necessary in the course of investigation, yet they may and should always require the examination of witnesses to be conducted in a spirit of due delicacy, avoiding vulgar and obscene language.

The decree of the court below is affirmed with costs.

DUPONT, J., dissenting. ●

I am constrained to dissent from the judgment of affirmation pronounced in this cause, nor do I concur in the views of my brethren upon the moral aspect of the case, as presented by the evidence. I can discover, in the vast amount of testimony contained in the record, not one gleam of light which would serve to relieve the darkness of the

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Abernathy vs. Abernathy.—Dissenting Opinion.

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moral picture presented to us by the general conduct and deportment of this defendant, and as little do I concur in the reprehension of and the rebuke which has been administered to the individual who appears on the record as the next friend of the complainant. So far from viewing his interference as an outrage upon the conjugal rights of the defendant, I think, considering his relation to this unfortunate female, that he must have been lost to every impulse of manliness had he hesitated to interpose for the purpose of arresting her in the downward course to degradation, to which she was fast tending, through the influence of her connection with a dissipated, debauched husband.

But all these matters I consider as having nothing to do with the question properly presented for our adjudication. It is not the question of divorce or separation that we are called upon to decide, but simply whether or not an individual should be removed from his office of trustee of an estate. In considering that question, it seems to me that but two very simple enquiries are presented: First, has the trustee been prudent and discreet in the exercise of his functions? and, secondly, would the trust property be endangered by a longer continuance under his control? According to the proofs taken in this case, I think that these questions are of very easy solution. The evidence shows, that, in the brief period of two or three years, the trustee has managed to get rid of every vestage of the trust property, save one negro man, Harry, and that but for the prompt and friendly interposition of this very next friend, who has been so sternly rebuked for his interference, even that small fragment of the wrecked estate *would have been sold under execution for a debt of the trustee*. But the trustee denies, in his answer, the charge of "waste," and yet that fact and admission contained in that very answer

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*Abernathy vs. Abernathy.—Dissenting Opinion.*

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show a most reckless and improvident dealing with the property.

In view of all the facts disclosed by the answer and the proofs, it is impossible for me to resist the conclusion that this trustee should be removed and the property be placed in the custody of one who may be better disposed to protect, if not improve it, for the benefit of this unfortunate lady.



DECISIONS

OF THE

Supreme Court of Florida,

AT

TERMS HELD IN 1859.

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EDWARD BRADFORD, APPELLANT, vs. A. S. COLE, AP-  
PELLEE.

1. The fact of a road having been an old one has no weight in determining an application for the establishment of a road under the statute.
2. A petition for the establishment of a road under the statute should be signed by twelve or more householders, inhabitants of the county, praying for the establishment of a neighborhood or settlement road, and not by an individual representing his own interests.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

The opinion of the Court contains a full statement of the facts of the case, to which reference is made.

*Archer & Papy* for appellant.

*J. B. Gallbraith* for appellee.

BALTZELL, C. J., delivered the opinion of the Court.

This case arises on an appeal to the Circuit Court from an order of the County Commissioners of Leon county establishing a road. That court having affirmed their decision, an appeal has been taken to this Court presenting the propriety of their action.

The appellee Cole presented a petition, alleging that "there has been on the proposed route a road, running through Dr. Edward Bradford's land, of ingress and egress, for the last fifteen or twenty years; that it is the nearest road of the petitioner to Tallahassee and to that portion of the neighborhood in which his practice lays; that it would inconvenience persons sending for him in his professional business as a physician and compel them to go some five miles farther, and he prays the Commissioners to give it consideration and report whether or not the said Bradford would be damaged more by the road being opened or the community by its being closed." To this the signature of A. S. Cole is attached. Added to this is a writing to this purport: "We, the undersigned, residents of the neighborhood, join with A. S. Cole in his petition." Signed, R. C. Williams, and some twenty others.

The Commissioners appointed three persons to view and mark out said road and report to the Board, as the law directs, who reported that they had marked out a road, giving its course and distance, and also stating their belief that the road is necessary and should be established, and that it would be of great convenience to the inhabitants, and further, that it has been a neighborhood road for a great many years. The Board of County Commissioners adopted this report, after hearing testimony and argument of counsel, and declared the road "a public neighborhood road."

The fact of this having been an old road cannot have weight in the consideration of the case; for if the party has right through this, there is no need of his application, and his remedy is by indictment for obstruction, or action on the case, &c. We confine ourselves, then, to the application to establish a new road. The subject is one of greater interest and importance than would seem at first sight. The right of the citizen to his property—to his land—to have it free from the molestation and intrusion of others for any purposes inconsistent with his own use and enjoyment, has been declared and recognized in the earliest periods of English and American history. Hence it is said in the text books, that “the Legislature may not arbitrarily strip the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is considered as an individual treating for an exchange. All that the Legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an extension of power which the Legislature indulges with caution.”—1 Black. Com., 139.

An American writer of eminence expresses himself with force more fully as to the right with us and says: “In a State governed by a written Constitution, if the Legislature should so far forget its duty and the natural rights of an individual as to take his private property and transfer it to another when there is no foundation for the pretence that the public is to be benefitted thereby, such an abuse of the law of eminent domain would be an infringement of the letter as well as the spirit of the constitutional law and therefore is not within the general powers delegated to the Legislature.”—Angel on High., 59; Varick vs. Smith, 5 Paige, 137.

The same writer again states: “The doctrine that the

right of eminent domain (that is, the right to take from the citizen his land,) exists for every kind of public use or for such a use when merely *convenient*, though not *necessary*, does not seem to be clearly maintainable, it being too open to abuse. A road, if really demanded in particular forms and places to keep up with the wants and improvements of the age, such as its pressing demands for easier social intercourse, quicker political communication or better internal trade, and advancing with the public necessities from blazed trees to bridle paths and thence to wheel roads, turnpikes and railroads. But when we go to other public uses, not so urgent nor difficult to be provided for without this power of eminent domain, and in places where it would be only *convenient but not necessary*, strong doubts may be entertained of its applicability. The user must be for the people at large, for travelers, for all—must be a right by the people—must be under public regulations as to tolls or owned or subject to be owned by the State.”—Angel, § 86.

In the case of the West River Bridge Company vs. Dix, decided by the Supreme Court of the United States after elaborate argument and very mature consideration, views were expressed by the Court and more particularly by that distinguished man and eminent jurist, Judge Woodbury, well deserving of regard. “I am even disposed to go further and say, that if any property of any kind is not so situated as to be either in the direct path for a public highway or be really needed to build it, the inclination of my mind is that it cannot be taken against the consent of the owner; because, though the right of eminent domain exists in some cases, it does not exist in all, nor as to all property, but probably as to such property only as, from its locality and fitness, is necessary to the public use.”—4 Myl. & Craig, 116; 1 Rail. cases, 176.

And also, for aught I now see, circumstances must, from its locality and the public wants raise an urgent necessity for it. The public necessities are spoken of usually as the fit occasion to exercise the power, if it be not derived from them in a great degree, and the reason of the case is confined to them. The ancient *trinoda necessitas* extended to nothing beyond such necessity. It may be and truly is that individuals and the public are often extensively benefitted by private roads as they are by mills and manufactories and private bridges, but such a benefit is not technically nor substantially a public use unless the public has rights.—1 Rice, 388. And, in point of law, it seems very questionable as to the power to call such a corporation a public one and arm it with authority to seize on private property without the consent of its owners. Again, "It is not enough that there is an act of incorporation for a bridge, a turnpike or railroad to make them public so as to be able to take property constitutionally without the owner's consent, but their uses and object or interests must be what has just been indicated—must, in their essence, character and liabilities, be public, within the meaning of the term public use."—6 Howard S. C. R., 545-'7.

As to the mode of proceeding, it is laid down to this effect: "Under our institutions no man can be deprived of his rights, save by the law of the land, or the judgment of his peers; and when private property is to be taken, as in this case, for the public use, it is important that all the forms of law should be complied with, for these forms have been devised and certain restrictions adopted for the protection of private right against public oppression." By Edwards, Judge, 1 Barb., 289; Angel on High., § 122.

With all this, we are not satisfied to declare that the law providing for the establishment of a neighborhood road

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Bradford vs. Cole.—Opinion of Court.

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without the consent of the owner is unconstitutional. The point has not been made before us nor argued, and passing upon a question of such importance should only be after serious deliberation and required by the stern necessities of the case. Upon other grounds, we think the proceeding in this case is not tenable. There was no application to the County Commissioners for the establishment of a neighborhood road, nor is such established. In cases of application for a settlement or neighborhood road, the order should be for the establishment of such road, and not a public road. The petition should be signed by twelve or more householders, inhabitants of the county, *praying* for the establishment of a neighborhood or settlement road. This petition makes no such prayer and with difficulty may be regarded as the act of the twelve or more persons connected with the application. The prayer is to ascertain "whether Bradford would be damaged more by the road being opened or the community by its being closed." We have said that there is no prayer, as directed by law, for a neighborhood road; so far from it, the petition sets forth a private grievance in being deprived of the use of the road and being compelled to go to a greater distance by the individual applicant, and the injury of himself and his customers, his patients, (he being a physician) in getting his services. Now, this is plainly an individual act and individual injury, for which the law gives no redress, or not such as this law prescribes. We are not for extending to proceedings of this kind technical rules, or requiring more than a substantial compliance with the law, yet, in the present instance, we can but regard this objection as of the essence of the matter and fatal to the entire proceeding; for, if mere individual benefit, profit, convenience or advantage is to operate in grants of this kind, where is it to end? The mer-

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Lignoski, for use of, vs. Bruce.—Statement of Cape.

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chant, mechanic, millman, planter, will alike have interests to subserve by having roads to his house, store or workshop, and the whole country be cut up by private roads. Take away the private inconvenience to petitioner and there is no excuse nor pretence for the road, and if he leaves or removes from the neighborhood, there would seem to be no use for the road. Rightly, the petition should be by the people of the neighborhood, setting forth a neighborhood necessity and praying for a neighborhood, not a private road. In case of objection, the proceeding and suit should be by these petitioners, and not by an individual representing his own interests.

The order and decision, as well of the Board of County Commissioners as of the Circuit Court, will be reversed and set aside with costs and the case remanded to the Circuit Court that the proceeding may be dismissed.

PEARSON, J., dissenting.

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B. R. LIGNOSKI FOR THE USE OF ANDREW L. O'BRIEN,  
APPELLANT, VS. ELIZA A. BRUCE, APPELLEE.

1. Where the husband sues for the recovery of the separate property of the wife, which is secured to her by the "married woman's law," she must be joined as a co-plaintiff.
2. A married woman cannot maintain an action at law, in her own name and alone, for the recovery of her separate property secured to her by the statute. *Quere.*—If the husband has abandoned her or obstinately refuses to join her?

This case was decided at Tallahassee.

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Lignoski, for use of, vs. Bruce.—Opinion of Court.

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Appeal from Leon Circuit Court.

B. R. Lignoski instituted an action of assumpsit for the use of A. L. O'Brien on a promissory note executed by the appellee to Caroline M. Lignoski, of which the following is a copy :

"On or before the first day of January next, I promise to pay to Caroline M. Lignoski, or order, five hundred dollars, for value received, with eight per cent. interest from date.

ELIZA A. BRUCE.

"July 30th, 1855."

The declaration alleged that the defendant "made her promissory note in writing and delivered the same to Caroline M. Lignoski, then and now a married woman and wife of the said B. R. Lignoski, and thereby promised to pay to the said Caroline M. Lignoski, or order," &c., without alleging any endorsement of said note by Caroline M. Lignoski.

The defendant demurred to the declaration, upon the ground that the action was not maintainable in the name of B. R. Lignoski, and, the Court below sustaining the demurrer, plaintiff appealed.

*D. P. Hogue* for appellant.

*Archer & Papy* for appellee.

DUPONT, J., delivered the opinion of the Court.

This was an action of assumpsit by the appellant, for the use of Andrew L. O'Brien, against the appellee as maker of a promissory note, payable to Caroline M. Lignoski, (the wife of the plaintiff,) "or order." The note was not transferred by *indorsement*, and hence the allegation "for the use," &c. There was a *demurrer* to the declaration, upon which judgment was given for the defen-

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Lignoski, for use of, vs. Bruce.—Opinion of Court.

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dant in the Court below, and the appeal is from that judgment.

The only question arising upon this demurrer is as to the right of the husband under the provisions of our statute, passed for the protection of the rights of "married women," to maintain the action *in his own name*. The other question argued by the counsel for the appellee, viz: the legality of the transfer of the note to O'Brien, does not arise in this state of the case, and we are to deal with the question as though the recovery was for the benefit of the wife. What change our statute has made in this respect can be seen only by a critical examination of its several provisions. The act was passed March 6th, 1845, and is as follows:

"SEC. 1. Hereafter, when any female, a citizen of this State shall marry; or, when any female shall marry a citizen of this State, the female being seized or possessed of real or personal property, her title to the same shall continue separate and independent and beyond the control of her husband, notwithstanding her coverture, and shall not be taken in execution for his debts: *Provided, however,* that the property of the female shall remain in the care and management of her husband.

"SEC. 2. Married women may hereafter become seized or possessed of real or personal property, during coverture, by bequest, devise; gift, purchase or distribution, subject, however, to the restrictions, limitations and provisions contained in the foregoing section.

"SEC. 3. Any married woman having separate and independent title to the property under and by virtue of this act, shall not be entitled to sue her husband for the rent, hire, issues, proceeds or profits of said property; nor shall

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Lignoski, for use of, vs. Bruce.—Opinion of Court.

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the husband charge for his management and care of the property of the wife.

"SEC. 4. The husband and wife shall join in all sales, transfers and conveyances of the property of the wife, and the real estate of the wife shall only be conveyed by the joint deed of the husband and wife, duly attested, authenticated and admitted to record, according to the laws of Florida regulating conveyances of real property."

These are the only provisions of the statute which would seem to bear upon the question under consideration. By a careful examination, it will be perceived that the husband's relation to the property is affected only so far as the *title* is concerned. *That* is secured to the wife, but the *care and management* of the property stands as it did at common law. He is to have the "care and management" of it, free of any *charge* therefor and *without account* to the wife for the "rent, hire, issues, proceeds or profits" of the same. Charged as he is with the "care and management," which clearly implies the *custody and possession* of the property, the logical conclusion is that he must be invested with the right to use such means as may be necessary and proper to obtain that possession. In this view of the act, we are of the opinion that the *appropriate remedies* of the common law are not affected by the statute, but that they remain as they were before its passage. He is the *statutory trustee* of the property, with qualified powers, holding it for the wife as the *beneficiary*.

The rule by which to determine when and in what cases the wife shall be joined as a co-plaintiff with the husband is very clearly and definitely laid down in the old books, however it may have been departed from in some modern decisions. In Bacon's Abridgment (Tit. Baron & Feme K.,) it is laid down that "in those cases where the debt or

cause of action will *survive* to the wife, the husband and wife are regularly to join in the action."

Mr. Chitty says: "And it is a general principle that that which the husband may discharge alone and of which he may make disposition to his own use, for the recovery of *this* he may sue without his wife." The converse of the proposition is clearly implied, that if it be a demand which he may *not* discharge alone, or of which he may *not* make disposition to his own use, for the recovery of such demand the wife must be joined. The same author goes on to remark: "As mere *choses in action* of the wife do not by the marriage vest absolutely in the husband, until he reduces them into possession, and if not reduced into possession, she would take them by *survivorship*, in general, he cannot sue alone."—1 Chitty's Pleading, 32-3, marginal.

In Clapp vs. Inhabitants of Stoughton, it is said: "The true rule is, that in all cases where the cause of action by law *survives* to the wife, the husband cannot sue alone. 10 Pick. Reps., 463.

The common law *test*, then, as to the capacity of the husband to sue alone, seems to rest upon *the right of survivorship in the wife*. This being established, it follows of course that as the *title* to the property is secured to her by the statute, and totally absolved from his marital rights, she must be joined as a co-plaintiff with him in all actions which he may bring for the recovery of her separate property.

It was contended, however, by the counsel for the appellee, that the action should have been *in the name of the wife alone*, and the argument was pressed that to give to the husband the right of recovery would be to jeopard the interest of the wife. We reply, that her interest will be in no greater danger under this ruling than it is under a "*set-*

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Lignoski, for use of, vs. Bruce.—Opinion of Court.

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tlement" in which a trustee is specially appointed, or in a case where the husband becomes the trustee by operation of law in the absence of a special appointment. The Court of Equity is always open for the protection of trust property, and in the case before us, if there has been a transfer of the note against the consent and wishes of the wife, or, should she apprehend a misappropriation of the proceeds when recovered, upon a proper application on her behalf, that court would promptly interpose for the preservation and protection of her rights.

We are inclined to look upon these enactments as highly beneficial to society. In this age of extravagant and other reckless speculation, when fortunes are won and lost in a day, surely something should be done to protect the innocent and the helpless, and we can conceive of no surer means of bringing these enactments into disrepute and of ultimately affecting their repeal and total abrogation than by pushing them to extremes. It is revolting to the sentiments of a refined people that the law should be so interpreted as to set up an "*imperium in imperio*" and thus subvert the foundation of the matrimonial relation. The entire independence of the wife as a suitor in the public tribunals, besides its revolting indelicacy, would doubtless become the fruitful source of discord in the family and engender dissensions for which no protection of her interests would afford any adequate compensation. The legislation of our State on this subject, we think, has struck the happy mean between the extreme exactions of the common law and the demoralizing radicalism of "woman's rights." Whether an abandonment by the husband, or an obstinate refusal on his part, would authorize the wife to sue by *prochien ami*, we do not decide.

Several of the States have, within a few years back,

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Lignoski, for use of, vs. Bruce.—Opinion of Court.

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legislated on this subject, and if there had been any degree of uniformity observed in their respective enactments, their judicial interpretations might have mutually served as *precedents* to each other. But such has not been the case. In New York, for instance, their acts of 1848 and 1849 go so far as to give the wife the *exclusive* control of the property and of the rents, issues and profits thereof, and also authorizes her to alienate and dispose of the same entirely independent of the concurrence of the husband; and, as if with a design to put the intention of the Legislature beyond dispute, it is provided in the latter act that property settled on the *feme covert* by deed of trust shall be conveyed and given up to her by the trustee "on her written application, accompanied by a certificate of a Justice of the Supreme Court that he has examined the condition and situation of the property and made due enquiry into *her capacity to manage and control the same*." In that State the existence of the husband is totally ignored, and it is not at all strange that, under these provisions of their statute, the Supreme Court should have held to the capacity of the wife to sue *alone* in a Court of law for the recovery of any portion of her property.—*Vide* Smart vs. Comstock, 24 Barb. S. C. Reps., 411.

The same doctrine is held in Alabama, but the right to sue alone is expressly given by section 2,131 of the Code. In the case of Pickens and wife vs. Oliver, the Court say: "Unaided by the provisions of the Code, the right which a married woman has in her separate estate cannot be regarded or enforced in her name in a Court of law. The trustee named in the instrument, if one is named, or, if none be named, her husband holds and asserts the legal title."—Pickens and wife vs. Oliver, 29 Ala. Reps. N. S., 528; Gibson vs. Marquis and wife, *ib.*, 668.

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Jones et al. vs. Dexter, adm'r, et al.—Statement of Case.

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We have not been able to find that the question as to the capacity of the wife to maintain an action at law has ever been metted in the Courts of Mississippi, where there is a statute similar in its provisions to ours. That she may *not be sued* upon her contracts in a Court of law has been fully settled in the adjudications of that State.

Let the judgment of the Court below, sustaining the demurrer to the plaintiff's declaration, be affirmed with costs.

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MARY ANN JONES AND OTHERS, APPELLANTS, VS. THOMAS D. DEXTER, ADMINISTRATOR OF CAROLINE V. SUMMERLIN, DEC'D, AND OTHERS, APPELLEES.

1. The act of 1828, which adopts the provisions of the law regulating descents as furnishing the rule for the distribution of personal estate, was intended to refer to any law of descents which might be in force at the time that the right to the distribution might become vested.
2. The two *provisos* contained in the act of 1829 regulating descents, and which constitute paragraphs ten and eleven of section one in Thompson's compilation, *do not apply* to the distribution of *personal estate* of an infant dying under the age of twenty-one.
3. Where the provisions of an act are adopted by a *general reference*, the act will receive a more liberal construction than if originally passed with reference to the particular object.
4. Where a statute has been enacted with special reference to a *particular* subject and by another statute its provisions are directed in *general terms* to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the *original* statute shall be restrained and limited to such only as are applicable and appropriate to the *new* subject.

This case was decided at Tallahassee.

Appeal from Columbia Circuit Court.

Caroline V. Summerlin, daughter of complainant Mary Ann Jones, died an infant possessed of considerable personal estate, derived from her father, Jacob Summerlin, deceased. Jacob Summerlin, at his death, left two children by his marriage with said Mary Ann Jones, one of whom was the said Caroline V. Summerlin, dec'd. He also left five children by a former marriage. After the death of said Jacob Summerlin, the complainant Mary Ann intermarried with James S. Jones, and by this marriage had three children at the time of the death of said Caroline V. Summerlin. At her death, therefore, Caroline V. Summerlin left her mother Mary Ann Jones, the surviving child of the marriage of Jacob Summerlin, deceased, with complainant Mary Ann Jones, being a sister of the whole blood, the five children of the first marriage of Jacob Summerlin, deceased, being brothers and sisters of the half blood by the father's side, and the three children of her mother Mary Ann Jones by her marriage with James S. Jones, being brothers and sisters of the half blood by the mother's side, as her heirs at law.

The bill of complaint was filed by Mary Ann Jones and her three children by her marriage with James S. Jones against the other heirs at law and against Thomas D. Dexter, who became administrator of the estate of Caroline V. Summerlin, dec'd, claiming that the estate personal of said Caroline goes in distribution to her mother, brothers and sisters, the mother and sisters of the whole blood taking whole portions, and the brothers and sisters of the half blood on both sides taking half portion.

The defendants demurred to the bill of complaint, which demurrer being sustained, complainants appealed.

*Archer & Papy and M. Whit Smith for appellants.*

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*Sanderson & Forward* for appellee.

DUPONT, J., delivered the opinion of the court.

This case presents for the consideration and determination of the Court the important and interesting question as to the rule to be observed in the distribution of the *personal* estate of one dying in infancy.

In the year 1822, at the first session of the Territorial Legislature, then denominated the "Legislative Counsel," an act was passed known as the act regulating descents. This act continued on the statute book until the session held in the year 1828, when it was re-enacted by operation of the statute generally designated the "condensation act." That condensation act expressly repealed all acts theretofore passed which should not be enumerated in its body, and expressly re-enacted all such as should be so enumerated by their respective titles. Amongst the acts so enumerated was this act of 1822. At the same session of the Legislature in 1828, an act was passed directing the mode in which *personal* property should be distributed. The provision of that act is as follows, viz: "That, after all debts and legacies have been paid, the property remaining in the hands of the executor or administrator shall be distributed according to the provisions of the law regulating descents."

In the following year (1829,) and at the succeeding session, the Legislature passed a new act to regulate descents and repeal the old act upon that subject. The new act embodied substantially the provisions of the old act, but contained as "*provisos*" two sections not embraced in it. These provisos constitute paragraphs 10 and 11 of section 1 in Thompson's compilation, and are in the following words, viz:

"10. *Provided, however, and be it further enacted, That*

whenever an infant shall die without issue, having title to any real estate of inheritance derived by gift, devise or descent from the father, and there be living at the death of such infant his father, or any brother or sister of such infant on the part of the father or paternal grandfather or grandmother of the infant, or any brother or sister of the father, or any descendant of any of them, then such estate shall descend and pass to the paternal kindred, without regard to the mother or other maternal kindred of such infant in the same manner as if there had been no such mother or other maternal kindred living at the death of the infant, saving, however, to such mother any right of dower which she may have in such real estate of inheritance.

“11. And where an infant shall die without issue, having title to any real estate of inheritance derived by gift, devise or descent from the mother, and there be living at the death of such infant his mother or any brother or sister of such infant on the part of the mother, or the maternal grandfather or the grandmother of the infant, or any brother or sister of the mother, or any descendant of any of them, then such estate shall descend and pass to the maternal kindred without regard to the father or other paternal kindred of such infant in the same manner as if there had been no such father or other paternal kindred living at the death of the infant, saving, however, to such father the right which he may have as tenant by the courtesy in the said estate of inheritance.”

It is upon the construction and application to be given to the first proviso that the question arises in this case. The facts of the case are briefly these: Jacob Summerlin died in Columbia county, in the State of Florida, leaving as his widow Mary Ann, (now Mary Ann Jones.) Prior

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to his marriage with the said Mary Ann, he had by a former marriage several children, and several also by the said Mary Ann after his intermarriage with her, all of whom are defendants in this cause. At the time of his death he was possessed of a large personal estate, which was distributed in due course of law to his several children by both marriages. Mary Ann, the widow, afterwards intermarried with James S. Jones and has had by him three children, who, together with their mother, are the complainants in the bill. Caroline V. Summerlin, one of the children of the said Mary Ann by her first husband Jacob Summerlin, died an infant under the age of twenty-one years, leaving a considerable personal estate in the hands of her guardian, upon which estate Thomas D. Dexter, one of the defendants, administered. It is for the distribution of this *personal* estate that the bill has been filed. The Chancellor decided, that the "proviso," before referred to as being contained in the act regulating descents, was applicable to and formed the rule for the distribution of personalty, and that, as the property was derived immediately from the father, the mother and her children by her intermarriage with Jones was excluded from any participancy in the same. From that decision the appeal to this court has been taken.

Two positions are assumed by the counsel for the appellants: 1st, That the act regulating descents, of 1822, furnishes the rule for the distribution of the personal estate; 2nd, That even if it should be decided that the act of 1829, and not the act of 1822, is to be taken to furnish the rule, yet the *provisos* contained in that act and above recited are inapplicable and never were designed by the Legislature to refer to personal property. The converse of these propositions is held by the counsel for the appellees, and upon their resolution depend the rights of

the respective parties. The point in issue has never before been brought before this court, and its importance has claimed, as it has received for it, our most anxious and mature deliberation.

The point first to be considered is, whether the prior act of 1822 or the subsequent one of 1829 shall be taken to furnish the rule for the distribution of the personalty. In order to fully appreciate the difficulty of the question, it must be noted that we have no *distinct and independent* statute prescribing a rule for the distribution of personal estate, but that the rule has been inaugurated by an act simply *adopting in general terms* "the provisions of the law regulating descents." It must be further noted, that the adopting statute was passed in 1828, which was after the date of the first statute of descents and prior to the passage of the second. Hence the difficulty of determining to which of these acts reference is to be had for the rule.

In tracing the history of our legislation upon this subject, it will be found that provisions similar, though not identically the same as the two "provisos" contained in our statute of 1829, are embraced in the act of Virginia, which was intended to regulate the descent of real estate in that State, and that, as with us, they adopted the law of descents as furnishing the rule for the distribution of personal property. These provisions in the Virginia statute of descents were adopted by the State of Kentucky upon the occasion of her admission into the confederacy, and from the similarity of the phraseology of the two "provisos" to be found in our act of 1829, it is quite probable that the idea was borrowed from the legislation of those States. In the mutations which occurred in their legislation upon the subject of descents, the question now under consideration arose in both States and was adjudicated by

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their respective Courts of Appeal. In both of those States it was decided that the act of descents which was in force at the date of the act which adopted the provisions of the law regulating descents as the rule for distribution should be taken to be the act referred to. Upon reference, however, to the arguments of the judges who delivered the opinions in those cases, it will be found that they based their decision *mainly* upon the ground that the prior act was particularly referred to in the adopting statute *by its title*—Tomlinson vs. Dillard, 3 Call's Reps., 93; Tomlinson vs. Dillard, 1 Munf. Reps., 183; Pinkard et al. vs. Smith and wife, Littel's Select. Cases, 331.

In the construction of our statute of 1828, we are wholly relieved from the pressure which bore upon the Virginia and Kentucky Courts, growing out of the particular phraseology of their adopting acts. Our statute makes no reference to any particular act, *by its title or otherwise*, but uses the broader and more comprehensive term "law"—"the *law* regulating descents." The term "law" is more general than the term "act," and is of much more extensive signification, and especially so in its application when the latter is limited and qualified by the designation of its title. Had the Virginia and Kentucky acts been thus general, there is the strongest reason to conclude, from intimations to be gathered from the opinions delivered in the cases, that the determination of this point would have been the reverse of what it was. But, upon principle, we are well satisfied that such should be the decision of the point in this case. It would be monstrous indeed to hold, that because the provisions of a statute, especially enacted with reference to a particular subject, had been, by *mere adoption in general terms*, applied to a subject of an essentially different nature, those provisions still continued in force in relation to that other subject, notwith-

standing the original act should have been expressly repealed. The bare announcement of the proposition furnishes its own condemnation. It is illogical and wholly incompatible with any idea of sound reason. We are not unaware that there are instances where a repeal of the original act operates no further than to affect the original subject, and that its provisions may still retain their vitality so far as they apply to the *new* subject notwithstanding the repeal; but this is not of that class of cases. Our conclusion, then, upon the *first* point is, that the act of 1828 was designed to refer to any law of descents which might be in force at the time that the right to the distribution vested. Under this ruling, we decided that the provisions of the act of 1829 are to be taken as furnishing the rule for distribution of the *personalty* belonging to this estate so far as those provisions may be found to be applicable. This brings us to the consideration of the second point proposed, viz: the *applicability* of the two "provisos" contained in that act to personal estate.

The books furnish rules for the construction of statutes as multiplied and various almost as are the statutes themselves. These rules are the work of ages. They have been inaugurated and brought into practical application by the exigencies of past adjudications, and all designed to subserve one grand object—the ascertainment of the legislative will. And while a great Judge—one of the lights of the English bench—has said, that as new cases shall arise so must new rules be necessarily applied, we are inclined to the belief that the present body of rules will be found amply sufficient to meet any case of construction that can possibly arise. Indeed, we are inclined to look upon what are usually denominated "rules" rather as "principles" deduced from, than as the rules themselves. In this view of the subject, we can perceive no

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necessity for adding to the admirable, comprehensive and well-defined rules which have been announced by the two masters of the common law, Coke and Blackstone. Without encumbering the argument with a formal discussion of these rules, it will suffice to state a few of the principles which have served to guide us to the conclusion at which we have arrived upon the point now under discussion.

It is laid down, that "a remedial act shall be so construed as most effectually to meet the beneficial end in view and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally. Receiving an equitable or rather a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes, it has been said, the construction made is contrary to the letter, which should be read, *ultra* the letter and confined to ancient statutes. Thus it is laid down that a statute may be extended to *other cases* within the same mischief and occasion of the act, though not expressly within the words." Dwarries on Statutes, 614.

"It is a sound rule of construction, but applicable" (said Lord Denman in a recent case) "to modern as well as to ancient statutes (perhaps, indeed, more so from necessity, in consequence of the looseness of expression which now prevails.) that in the construction of *general references* in acts of Parliament, such reference must be made only as will stand with reason and right." "Where a provision is in its original and natural application limited in respect to time and place, it is to give to general words of incorporation a meaning contrary to reason, and it may be to justice, to hold that they apply to it."—Dwarries on Statutes, 602, citing 2 Inst., 287; 6 Q. B. Reps., 343.

"A clause of reference to an excise statute was held to

extend only to the general powers and provisions of that law, and not to every particular clause.”—Dwarris on Statutes, 602.

“The fair construction,” said Ashurst, J., “to put upon the clause of reference in question” (which was a general clause) “seems to be this, that all the general powers and provisions given and made in acts *pari materii* shall be virtually incorporated in this, but that such provisions as are always considered as *special* provisions shall not.”—*Ib.*

The doctrine to be deduced from these citations, and which is peculiarly applicable to the construction of our statute is, that where the provisions of a statute are adopted by *general reference*, it will receive a more liberal construction than if originally passed with reference to the particular subject.

“In applying rules for interpreting statutes to questions on the effect of an enactment, we can never,” says Vattel, “safely lose sight of its object. That must be the truest exposition of a law which best harmonizes with its design, its objects and its general structure.”—Dwarris on Statutes, 556, citing Vattel, bk. 2, ch. §285.

With all the light afforded us by the very able argument of the counsel for the appellees, we have found it quite impossible, under the guidance of these principles, to resist the conclusion that it never was the intention of the Legislature, in adopting “the law regulating descents” as a rule for the distribution of personal property, that the “provisos” in the act of 1829 should be taken to apply. In arriving at this conclusion, we have not been unmindful of the caution contained in the suggestion as to the unsettling of estates, but we are yet to be satisfied that such would be the effect of this ruling; for considering the brevity of our political existence and the extreme

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rarity of estates thus derived, there cannot, in the nature of things, be much cause for apprehension on that score. At any rate, it is the imperative duty of this Court to announce the law as it is, and not to be deterred from its duty by considerations so remote and uncertain.

The nature of the property and the title by which it is held, to say nothing of the peculiar inapplicability of the saving clauses in these provisos, show conclusively to our minds that it could not have been the design of the Legislature that they should apply to personal property. If we look to the transitory nature of that species of property, it must be acknowledged that it is unsusceptible of any marks by which it could be traced to either the father or the mother as the source of acquirement. By what marks of designation could *stocks* be traced? How would we proceed to identify *money*? Could any means be devised to trace the origin of a stock of horses, cattle, hogs, sheep, &c. &c.? Even slaves themselves, held, as they may be, independent of the muniment of a paper title, may, in the lapse of years, be subjected to such changes as to render their origin extremely doubtful and uncertain.

But if the *nature* of the property furnishes an argument against the applicability of these provisos, what shall be said of the *title* by which it is holden? It would be unjust and highly offensive to the legislative branch of the government to presume that they were ignorant of the principles of the common law as applicable to this species of property, and yet such must be the conclusion, if we hold that they intended to apply these provisos to that kind of property; for, to what purpose would they establish such a rule for its distribution, when, by the canons of that law, *all* the personal property of the wife becomes the husband's by the act of marriage? If the provisos are to have the application contended for, we must attribute to the

Legislature either a total ignorance of this principle of the common law or the perpetration of a very senseless act of supererogation. But, to avoid this category, it has been suggested in this connection that the provisos referred to ought to be so construed as to admit of the enquiry whether the particular property was brought into the marriage by the father or by the mother. The answer to that suggestion is, that *that question* is at rest in this Court, it having been authoritatively settled in the well-considered case of Smith et al. vs. Croom et al.—7 Flo. Reps., 81. It was ruled in that case, after a most elaborate discussion *pro* and *con* by counsel of the highest character, assisted by two eminent jurists from South Carolina and Georgia, that the words “gift, devise or descent from the father,” or “from the mother,” occurring in the provisos embraced in the act of 1829, contemplated an *immediate* and not a *mediate* descent. In other words, that the statute was to be so constructed as to limit the taking by the infant to the parent from whom his title was *immediately* derived. Now, it is perfectly manifest and beyond all controversy, that, with respect to the *realty*, the Legislature designed that these two provisos should be perfectly *reciprocal*; that if the estate came to the infant from the father, it should upon his decease go to the paternal kindred; and if, on the other hand, it came from the mother, it should, under like circumstances, go to the maternal kindred. This principle of *reciprocity* is so patent upon the face of the statute, that no one has ever attempted to question it with reference to the *realty*. It is the prominent characteristic of the enactment, standing out in such bold relief as to hush every whisper of dissent. If this be so, with what show of reason can the Court be called upon to apply this enactment to the *personalty* when, from the very

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nature of the property and the laws governing the same, this principle of reciprocity cannot prevail? To give such an interpretation would be to make the adopting act of 1828 speak a language wholly foreign to the manifest intention of the Legislature. In support of this view, we refer to Dwarris on Statutes, where it is said, that “the words of an act are always to be modified by reference to the *subject* about which it is conversant.”

“In construing an act of Parliament, the same rules of construction must be applied as in the construction of other writings; and if the *subject-matter* to which an act of Parliament applies be such as to make a given construction of its clauses impossible or irrational, ‘I cannot,’ said Wigram, V. C., ‘for a moment doubt the right or the duty of the Court to have regard to such *subject-matter* as necessarily bearing upon the legal construction of the act. This is invariably done in the construction of wills and deeds, and the same principles are correctly applicable to the construction of an act of Parliament.’”—Dwarris on Statute, 508, 581, citing *Salkel vs. Johnson*, 1 Hare, 210.

And again: “In construing the words of an act of Parliament and collecting from them the intentions of the Legislature, the terms are always to be understood as having a regard to the *subject-matter*, for that, it will be remembered, will always be in the eye of the framer of the law and all his expressions directed to that end.”—*Ib.*

From the principles thus announced, it is not difficult to deduce the rule, that where a statute has been enacted with special reference to a *particular* subject, and by another statute its provisions are directed *in general terms* to be applied to *another* subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained

and limited to such only as are applicable and appropriate to the *new* subject. If such qualification be not observed, then with reference to the construction of this statute the absurdity is involved of giving to the mother "dower" and to the father "courtesy" in the *personal* estate of the infant, for both of these rights are secured by the *saving* clauses of the respective sections. How can either of these rights be predicated of *personal* property? The terms used are purely technical, and the rights saved pertain exclusively to *real estate*. If, then, the *saving clauses* may be rejected when about to deal with the *personalty* (as they must be,) we can discover no good reason why the entire proviso may not be also rejected as wholly inapplicable to the *subject-matter* to be affected.

Although not insisted upon, or even referred to, in the brief furnished by the appellees, it was, however, admitted by the counsel for appellants, that the provisos to be found in our act of 1829, and now under consideration, are *copies* from the Virginia act of 1792. Upon this admission, the suggestion has been made to the effect that, having adopted the Virginia act as a part of our statute law, we are bound by the interpretation given to it by the Courts of that State.

We are aware that it has long been the current and prevalent opinion of the profession that the two provisos embraced in our act of descents owe their paternity to the act of Virginia of 1792, but, upon a critical comparison of the two acts, this will be found to be an error. Our act has already been set out at large in this opinion, and, for greater facility of reference, we here set out the sections of the Virginia act:

"Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or

descent from the father, the mother of such infant shall not succeed to nor enjoy the same. nor any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them, saving, however, to such mother any right of dower which she may claim in the said real estate of inheritance.

“Where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the mother, the father of such infant, nor any issue which he may have by any person other than the mother of such infant, shall succeed to and enjoy the same, or any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the mother, or any lineal descendant of either of them, saving, however, to such father the right which he may have as tenant by the courtesy in the said estate of inheritance.”

It is perfectly obvious to the most cursory inspection that the enactment of the two States upon this subject is totally different, at least in point of phraseology, and every lawyer knows the controlling influence which the peculiarity of language always exerts in a manner of construction; but it is not in *phraseology* alone that they differ. The difference exists in matter of *substance* likewise: for, while by the Virginia statute the succession in the right line *ascending* extends to and includes only the father and the mother, by our statute the “grandfather and grandmother” are embraced. In the face of such obvious variances between the legislation of the respective States upon this subject, how, with any show of reason, can it be said that we have adopted the legislation of Virginia?

Again: The variance in the legislation of the two States is not confined alone to the provisos contained in the respective statutes of *descents*. It is equally and, if any-

thing, more marked in the acts which profess to adopt these acts as furnishing the rule for distribution. The adopting act of Florida is in these words:

"After all debts and legacies have been paid, the property remaining in the hands of the executor or administrator shall be distributed according to the provisions of the law regulating descents."—Thomp. Dig., 191.

The adopting statute of Virginia is as follows, viz:

"If there be no wife, then the whole of such surplus shall be distributed *in the same proportion and to the same persons* as lands are directed to descend in and by an act of the General Assembly entitled an act to reduce into one the several acts directing the course of descents."

While our act, in its reference to the law regulating descents, is as *general* as it could be made, the act of Virginia is as *special* and *definite* in its designation of the "proportions" and the "persons" to take as it was in the compass of language to make it. To ascertain what weight these particular words had in conducting to the conclusion arrived at in the case of Tomlinson vs. Dillard, before referred to, it is only necessary to refer to the language of the several Judges who delivered opinions in the same; for, it will be admitted that they all desired that the law should have been the other way. So great indeed was their anxiety and so urgent their recommendation, that at the very next session of the Legislature the law was altered to meet their views. Fleming, J., said: "The language of the acts of Assembly leave no room for criticism. That concerning the course of descents excludes the mother in terms from any share in the real estate, and that concerning distributions, passed at the same session of the Legislature, has declared that the personal property shall be distributable in the same manner and *go to the*

*same persons* with the real estate. This fixes that *the same persons* are to take both estates."

Carrington, J., referring to the language of the act, said: "This declaration leaves no room to doubt; for it is a clear expression of the legislative will that there shall be no distinction *as to the persons* who are to take, whether the estate be real or personal."

Pendleton, Pres., used this language: "But the words of the law appear to me to be too strong to admit of any construction by this Court, as they expressly direct that the personals shall go *to the same persons* as lands go to under the new law of descents."

Roane, J., one of the most eminent jurists of that day, *dissented* from the judgment of the Court, and, totally repudiating the idea of the applicability of these provisos to a case of distribution, concluded his masterly argument in the following language: "My conclusion, then, is, that the act of descents merely gives the *general* rule for the distribution of personal property by reference to the act of descents, but that, taken as well in relation to other laws or statutes as to *considerations* which are equal to such laws or statutes, it is only *lex sub graviore lege*. I will not bottom myself upon the mere letter of the statute (and that, too, couched under only *general* words of reference) and obstinately contend for a construction which is reprobated by the actual nature of the subject, confronted by so many absurdities, contradictions, inconveniences and incongruities, and the consequence of which will operate undoubtedly against the manifest *intention* of the Legislature."

The Kentucky case of Pinkard vs. Smith, before cited, however it might affect the argument upon the point first discussed, can have no bearing upon the one now under consideration, viz: "The *applicability* of the provisos to the

personal estate." By that case it was ruled that the Virginia act of 1785, which had been adopted by the Legislature of Kentucky upon her admission into the confederacy, was the particular act referred to in their statute making the course of *descents* the rule for the *distribution* of personal property. The provisions concerning the estate of a deceased infant were not incorporated in that act and, consequently, this point could never arise in that State.

That we shall declare *the intention of the Legislature* by adopting the conclusion at which we have arrived, we are fully satisfied. This construction of the statute is eminently just and proper. It is consonant with the best affections of the heart and commends itself to the general approval of mankind.

Let the decree of the Chancellor be reversed and set aside, and let the cause be remanded to the Court below, with instructions to proceed therein upon principles conformable to the views expressed in this opinion. The costs of this appeal to be paid by the appellees.

BALTZELL, C. J., dissenting:

Not concurring with the majority in the decision made, it is incumbent upon me as an act of duty to set forth the grounds of my dissent.

There is no difficulty as to the facts of the case, which are agreed to be as follows: Jacob Summerlin departed this life some years since, leaving a large estate, both real and personal, which was divided among his widow and seven children. One of these children, Caroline Summerlin, died in infancy, after her father, leaving considerable personal property derived and inherited from him, which is the subject of the present controversy. His widow intermarried with James S. Jones, by whom she has

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three children by whom and the wife this suit is instituted to recover full share of this property, claiming to be entitled thereto as distributees and heirs of Caroline Summerlin in common with the other children of Jacob Summerlin.

The law of the case is as follows:

“Property remaining in the hands of the executor or administrator, after all debts and legacies have been paid, shall be distributed according to the law of descents.”—Thompson, 191.

The law of descents, so far as it is applicable, is in these words:

“Whenever any person, having title to any real estate of inheritance, shall, die, it shall descend in parcenary to the male and female kindred in the following course: that is to say, if there is no father, then to his mother, brothers and sisters and their descendants, or such of them as there be: *Provided, however,* That whenever an infant shall die without issue, having title to any real estate of inheritance derived by gift, devise or descent from the father of such infant, and there be living at the death of such infant his father or any brother or sister of such infant on the part of the father, then such estate shall descend and pass to the *paternal kindred* without regard to *the mother or other maternal kindred* living at the death of the infant; saving, however, to such mother any right of dower which she may have in such real estate of inheritance.”—Thomp., 188-9.

Very clearly the express words of the law gives the property of this infant, Caroline Summerlin, derived from her father, to her brothers and sisters on the father's side, the Summerlins, and not to her mother, Mrs. Jones, nor to her children by Jones.

Not because there is actual difficulty, (for, with due def-

erence, I think the case is too plain to admit of argument,) it may be necessary to refer to the state of the law when the act of 1829, as to descents, was passed

. One of the first laws passed by the Territorial Legislature, as early as the 12th of August, 1822, was "a law regulating descents." During the same session, also, was passed the law quoted as to the distribution of the personality, which has remained in force all the time. In 1829 a law was passed containing the leading sections of the act of 1822, but with some new provisions. By this law of 1829, "*all acts and parts of acts now in force* and coming within its provisions were repealed."—Duval, p. 363. So far, then, as the law of 1829 repeals that of 1822, to that extent the latter thereafter ceased to be a rule of action, so that the inquiry is an important one, to ascertain what was repealed. There were no provisions, such as the 10th section of the law of 1829 quoted above, with the 11th, making a like regulation as to the property derived from the mother, in the law of 1822, so that by it the personality certainly (if not the realty) passed to the mother and brothers and sisters, whether of the whole or half blood, as by the statute and common law of England.—1 Will., 252; 2 Will. on Ex'ors, 925. The incorporation of these provisions in the law of 1829, and the express repeal of all acts and parts of acts then in force and coming within its purview, abrogated this descent to the mother and brothers and sisters as existing by the law of 1822.

The mischief under the old law would seem to have been the giving the property to those not connected by blood with the person from whom it was derived. The remedy was the passage of a law with clauses prohibiting such transfer, and by the primary canon of construction it is declared to be "the duty of the Judges at all times to

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make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for the continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.”—1 Black., 87; Dwar. on Stat., 717.

How a provision that has been expressly and directly repealed can be made to confer a right of property, is wholly beyond my powers of comprehension. The 10th and 11th sections do not apply to personalty, it is said, because of its nature, the difficulty of identifying it, the title by which it is holden, and, still farther, for want of reciprocity. As to the two former, no difficulty exists in this case, as all the property of the infant is admitted to have been derived from the father. It is strange that all the objections did not occur to the Legislature to prevent the passage of the law—stranger still, that in practice in no case for near thirty years since its enactment has complaint been made on this account. By common consent of lawyers, judges and people, this has been the settled construction, and estates during all this time have been settled and adjusted and rights derived and acquired under it. Our digests and compilations have been on this understanding. These same objections, scarcely varying in language or form of expression, were stated by one of the Judges of the Court of Appeals of Virginia and earnestly insisted on, but overruled by four of his associates, and again urged on other occasions and overruled upon statutes almost identical with ours.

Thus Fleming, Judge: “It is in vain, therefore, to urge the confusion and difficulties which it is said must ensue from this mode of interpreting the law, because the Court are bound down by its positive precepts and have no dis-



cretion in the matter; for, whatever latitude a Court may think proper to indulge where the expressions are ambiguous, they certainly have no right to do so when the words are clear; but if inconveniences follow from a literal construction, they must be redressed by the Legislature and not by the Court, who are not to torture the words in order to discover meanings which the Legislature never had, but are to preserve the plain import of the statute without regard to the consequences." Carrington, Lyons and Pendleton, President, expressed themselves more strongly to the same effect.—3 Call, 115. Another effort was made before the same Court in favor of the same views, but with less success than on this occasion, as not one of the Judges favored the objections.—1 Munford, 183; 2 Munf., 279.

In Kentucky a similar statute and similar provisions were enforced. In this State a distribution was decreed to the same effect.—Young's adm'r vs. McKinnie, 5 Florida, 542, 551. And yet these exploded notions of a single Judge, uttered in 1801, denounced by his own Court of four to one, condemned by the action of other Courts and not followed anywhere, are fixed upon as the views of the action of this court in direct opposition to rules and principles declared over and over again as applicable to such subjects. One of these is, that where a statute is in the terms of the law of another State, or of an English statute, the construction of their Courts is to be regarded as much so as if it had been detailed at length in the statute.—Reeves on Descents, 26.

If the provisos of the 10th and 11th sections are not in force as to the personalty, how are they to be separated and detached from the section to which they pertain? They are part and parcel of the third section, under which the mother, brothers and sisters derive their descent, and may no more be dispensed with than the section itself.

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If one is stricken out and disregarded the other must be so too, otherwise the anomaly is presented of an enactment carried into effect stripped of a leading and direct provision qualifying it in a most important and essential point. The statute says the property shall go to the mother, brothers and sisters, provided that when it is derived from the father it shall go to the paternal kindred, and not to the mother, and from the mother to the maternal kindred. Now by what process is a part of the statute saved and enforced and the other destroyed or disregarded? If availing for the personalty in the one case, why not in the other? "The effect of repealing a statute is to obliterate the statute repealed as completely as if it had never passed, and it must be considered as a law that never existed except for the purpose of those actions or suits commenced, prosecuted and concluded while it was an existing law."—Smith's Con., 889; Key vs. Godwin, 4 M. & C., 341. 351.

Now, considering the act of 1829 and the law for distribution of the personalty together, without reference to the act of 1822, can any doubt exist as to the operative force and influence of the provisos—the 10th and 11th sections—as to personalty? There seems to me to be an entire misconception as to the subject of reciprocity. What can there possibly be between these complainants and the the children of Jacob Summerlin? Reciprocity would dictate, if Jones' children succeed here, that the Summerlins would share with the children of Jones in case of their deriving property from their father or mother, and yet is anything of this kind pretended?

## TALLAHASSEE RAIL-ROAD COMPANY, APPELLANT, vs. ARTHUR MACON, APPELLEE.

1. The bailee of a slave upon hire is bound to bestow that degree of care and attention which a human master would bestow on his own servant under the like circumstances.
2. When there is conflicting evidence and the verdict is not manifestly against the weight of evidence, the Court will not interpose to set aside the verdict of a jury.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

This was an action on the case instituted by the appellee against the appellant for the recovery of the value of a negro slave hired to the appellant, who, it was alleged, died from the neglect and carelessness of the said company.

The defendant pleaded not guilty.

On the trial in the Court below the plaintiff offered as a witness Dr. George W. Betton, who testified, that, at the request of the plaintiff, he visited the negro man Esop on Saturday, the night of which day the said man Esop died. He was in a car, one side of which was open. The open side could have been closed, but, if closed, there was no opening for the air to enter. He stayed with the negro about one hour; says he ought to have been sent for earlier. The negro had not the necessary conveniences, and had to go out when required to answer the necessary calls of nature or the effects of medicine; thinks, therefore, that proper care and attention was not given to the negro. Had not seen the negro before the day he visited him, as already stated. Considered the negro to have been between forty and forty-five years old, and supposed he was worth from eight hundred to a thousand dollars.



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Here plaintiff rested his case.

Defendant, to sustain the issue on its part, offered as a witness—— Glennon, who being sworn, testified that he was employed by Mr. J. N. Whitner and was engaged in laying track on the Pensacola & Georgia Railroad. Esop, the negro in question, was one of the hands. Mr. Whitner hired Esop from the Tallahassee Railroad Company, and witness superintended for Whitner. Esop never handled the rails; he had not the strength, and was put to light work, such as ramming dirt under the cross-ties. He complained for several days and was permitted to lie up in camp. Witness did not think him much sick, as he was up and down and came in and out as he pleased. Witness directed that he should be cared for, and he received as much care and attention and fared as well as all other railroad hands when sick, including witness himself. The negro complained of a pain in the side, but he did not appear more sick than other negroes on the same work had been, and the same care and attention was given to him as to others, and as he, witness, himself had received. On the Saturday that the Doctor went to see him the negro appeared more sick than he had been, and witness directed a toddy to be given him and that he should be otherwise cared for. Pills were also given him. The negro was rather old; he showed age in his grey hairs. In the opinion of witness, he was between fifty and sixty years old, and witness did not consider him worth over three hundred dollars. Witness did not think he needed a Doctor before the day the Doctor came out to see him. Witness had been employed on the railroad (Tallahassee) for nearly two years, overseeing the hands and taking care of them, and this negro had been with him.

Defendant also offered —— Dozier as a witness, who, being duly sworn, testified that he knew Esop. He was one

of the hands on the railroad engaged in laying tracks on the Pensacola and Georgia Railroad. Witness was employed for the same purpose by Mr. Whitner, who was laying the track. Esop was sick and was suffered to lie up in one of the cars employed as a camp or house for the railroad hands. The car was well covered and tight. It was open on one side only, the space left for the door, but the door could be closed easily. He was up and down, in and out when he pleased, and complained of a pain in his side. The same attention was given to him as to all other railroad hands when sick, and the same remedies were administered to him. The cook-woman was directed to attend to him if he needed attention. On the Saturday that the Doctor went to see him, Esop seemed in the morning to be quite sick, and witness told Mr. Glennon of it, who directed witness to give him a toddy, which was done. All the care and attention which could be given to the negro under the circumstances was paid, and he fared as well as the rest of us. We had no idea that he was sick enough, before the day the Doctor came out, to need a Doctor. He was not confined to his bed, but went in and out as he pleased. He, in witness' opinion, was between fifty and sixty years old, and witness does not think he was worth more than two hundred and fifty or three hundred dollars.

Here defendant rested its case.

No other testimony being offered, the jury retired to consider of their verdict, and returned into Court rendering a verdict in favor of plaintiff for six hundred dollars. Whereupon defendant moved the Court for a new trial in this cause, and assigned as grounds for said motion the following, viz:

First. The verdict is contrary to the evidence.

Second. There is no evidence to support the verdict,

there being no evidence of any carelessness or negligence on the part of defendant.

Third. There is no evidence of the damages assessed by the jury.

Fourth. The damages assessed by the jury are excessive.

Fifth. The verdict is contrary to law.

The Court overruled the motion for a new trial and gave judgment for plaintiff, from which plaintiff appealed.

*Archer & Papy* for appellant.

*Walker & Call* and *S. A. Hart* for appellee.

PEARSON, J., delivered the opinion of the Court.

The exceptions presented by the record in this case and the errors assigned by the appellant all rest on the refusal of the Judge in the Circuit Court to grant a new trial. The appellant insists that there was no evidence before the jury to sustain the allegations of negligence, and that the damages were excessive. These questions, which heretofore were confided to the discretion of the Judge trying the case, have, under the statute of this State, been opened to the review of this Court, and where manifest error has been committed this Court will reverse the order of the Circuit Court and require a new trial to be granted.

In this case there were but three witnesses examined—Dr. Betton, a physician, on behalf of the plaintiff, testified, that, “at the request of *Macon*, he visited the slave Esop on Saturday. He found him very sick with pneumonia. Negro was in a car, one side of which was open. The open side could be closed, but, if closed, there was no opening for the air to enter. Says he ought to have been sent for sooner. The negro had not the necessary conveniences and was under the necessity of going in and out

of the car according to the exigencies of his sickness; that Esop died on the night of the day witness saw him."

Glennon and Dozier, for defendants, testified, that Esop complained for several days and was suffered to lie up in camp; that they did not think him much sick; that he was up and down, in and out, when he pleased; that they directed he should be cared for, and that he received as much care and attention and fared as well as other railroad hands when sick, including witnesses themselves; that Esop appeared more sick than he had been on the Saturday the Doctor visited him, and they directed a toddy to be given him, and that he should be otherwise cared for; pills were also given him, and the cook woman had directions to attend to him. Witnesses did not think he was sick enough to need a Doctor; that the car Esop was in was tight and well covered.

The testimony of Dr. Betton was positive that the negro had not the necessary care and attention; that he was very ill and had for some time needed medical aid. The evidence of defendant's witnesses proved that none had been provided by the company. The testimony of Dr. Betton, whose services were procured by the plaintiff, was also positive that the negro needed a nurse and other necessities required in sickness, and that neither were provided; that he was in an open car and under the necessity, in his extreme illness, only a few hours before his death, of going out into the open air. In all of these respects the witness Betton is uncontradicted by the evidence of Glennon and Dozier. These witnesses speak of their ignorance of the violence of his disease, of directions to the cook woman to attend to him,—not of her obedience of the order—of his having the same care and attention that other railroad hands received. They were employees of

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the company, having charge of the hands, so that they may be regarded in some degree as testifying in their own favor and to excuse their own want of attention—not entirely impartial. We would remark that the evidence seems to be very sparse on the part of defendants if they have indeed been guiltless. They do not offer to establish due care or provision for the sick in their charge, nor proper arrangements for them. As to the value of the negro, why not establish this by better testimony? There is indeed a deficiency on both sides here.

The Courts of Southern States, in adjudicating the question as to what shall constitute negligence in the bailee of a slave, have justly and humanely defined the rule to be any failure to bestow that degree of care and attention which a kind and humane master would bestow under the circumstances.—See *Lumsford vs. Baylman*, 10 *Humphs.*, 267; *Latimer vs. Alexander*, 14 *Geo.*, 259; *Mitchell vs. Mims*, 8 *Texas*, 6.

In *McCraney, Trustee, vs. Johnston & Moore*, 2 *Florida Reps.*, 527, this Court, recognizing the general principle, said, in cases of this peculiar species of property, the American Courts, by a spirit of enlightened humanity, have extended a more enlarged protection than prevails in cases of mere chattels. Concurring in the wisdom and truth of these decisions on this point, this Court is of opinion that the facts proved by the evidence did establish negligence, and that the jury were warranted in so finding by their verdict.

In regard to the other points raised by the appellant, that the damages were excessive and not warranted by the evidence, the witness Betton gave his estimate of his value at from \$800 to \$1,000, Glennon and Dozier at \$250 to \$300. They also testified to the slave's being employed for several years on the Tallahassee Railroad, and

of the kind of work in which the negro was employed. From the facts stated, the estimates of witnesses, the jury was enabled to form their opinion of his value, and if the evidence of Dr. Betton and the conclusions resulting from the fact of the continuous employment of the slave Esop by the Tallahassee Railroad Company for several years outweighed in their minds the statements of the employees Glennon and Dozier, it was not for the Judge, after the verdict, to measure precisely the degree of weight which each particular statement of fact must perforce have on the mind of a jury, and, striking a balance between the two, to set aside the verdict or render judgment as the balance may fall on one side or the other. To carry the rule for granting new trials thus far would be to invade the province of the jury. When there is conflicting evidence and the verdict is not manifestly against the weight of evidence, the Court will not interfere to set aside the verdict of a jury. We do not say that the amount given is the same that we would have given ourselves, but there is not such conflict and variance as to cause us to set it aside.

The general principle is well established, that where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury.—See 2 Rob. Prac., 549; Rigby vs. Hewitt, 5 W. N. and G., 240.

In the case of Harrison vs. Berkley, 1 Strobart, 525. the Courts of South Carolina carried the principle to the extent of holding a person who unlawfully sold ardent spirits to a slave, by means whereof the slave became intoxicated and died, responsible to the owner of the slave for his value. In Duncan vs. Railroad Company, 2 Richardson, 616, the same principle is recognized. In Tennessee, the master is at liberty to regard the wrongful act in a bailee

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as a conversion and sue in trover, to bring an action on the case, on the ground that the wrongful act by the bailee renders him liable for all its natural or immediate consequences, and the death of the slave during the second contract of hire has been decided in these cases to be a consequence of such a hiring.—See *Bell vs. Cummings*, 3 *Sneed R.*, 275; *Lumsford vs. Baylman*, 10 *Hump.*, 267; *Latimer vs. Alexander*, 14 *Geo.* 259; *Mitchell vs. Mims*, 8 *Texas*, 6; *Yeatman vs. Hent*, 6 *Hump.*, 375.

We do not consider it necessary on this occasion to affirm the correctness of any or all of these propositions. We give them as the views of intelligent Courts on the subject of this peculiar species of property. When these questions shall be presented for decision, we shall then make up and declare our views free from commitment on either side of the question.

It is a feature in this case worthy of some note, that on neither side were instructions asked from the Court, the parties contenting themselves with leaving the questions of law and fact to the jury. Under such circumstances, we should most obviously feel less inclined to interfere with a verdict than where proper means had been used to enlighten the jury as to the law and facts of the case and to their peculiar responsibilities. Defendant might have raised the questions of law as to the sufficiency of the declaration; if the proof of plaintiff was insufficient, moved for a non-suit and asked for instructions as to either the law or facts of the case. Failing to do this, he cannot hope to find a remedy, by a motion for a new trial, in this Court.

The Court are of opinion that there was no error in the refusal of the Judge in the Court below to grant a new trial. The judgment must therefore be affirmed with costs.

JAMES E. BROOME, WILLIAM FISHER AND HENRIETTA, HIS WIFE, AND SAMPSON BUTLER, APPELLANTS, VS. JOSEPH H. ALSTON, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF AUGUSTUS ALSTON, DECEASED, APPELLEE.

1. When an administratrix conveys the property of her intestate in a deed of marriage settlement in her own name and right, the deed is absolutely void and the title remains in the estate. But *quere* as to the effect it might have on the validity of the deed if the administratrix was found to be in advance to the estate at the time of making the deed to the full value of the assets conveyed.
2. By a rule of this court, no final or interlocutory decree shall be entered up without notice to the parties.
3. The general rule is, that the statute of limitations will not avail a party in whom the law raises a trust, as against the *cestui que use*,
4. The Court of Chancery has jurisdiction where accounts are to be taken and the property in controversy is encumbered by mortgages in the hands of a third party.
5. A party standing in the nature of a trustee by construction of law may purchase with his own means an outstanding lien upon the trust property in his hands.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

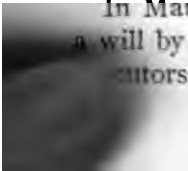
Augustus Alston in his life time being possessed of considerable real and personal property and having subscribed for stock in the Union Bank of Florida, executed a mortgage on his land and a part of his slaves to secure the stock so taken. In the year 1839 said Augustus Alston died intestate, and administration on his estate was duly granted to his widow, Mary Helen Alston, to whose hands came the property of the estate of said Augustus Alston.

In November, 1843, the said Mary Helen Alston intermarried with Sampson H. Butler. In anticipation of the said marriage, a settlement or deed of trust was executed

by which the said Mary Helen, by the consent and with the concurrence of said Sampson H. Butler, conveyed to James E. Broome, as trustee, twenty-two slaves, in said deed specified, as the property of said Mary Helen, for the use of the parties to the marriage during their joint lives, with permission to have and enjoy the use, advantage and profit of the said slaves without constraint, control or interruption, and with power in the said Mary Helen to dispose of said slaves and their increase by her last will and testament; but, in case she made no will, the said slaves were to be equally divided between the issue of the said intended marriage and Joseph and Henrietta Alston, children by her former marriage with Augustus Alston, deceased; and in case there should be no issue of the said intended marriage, then all the slaves and their increase to be vested in the said Joseph and Henrietta Alston. The slaves conveyed in this deed of trust, part of which were embraced in the mortgage to the Union Bank, had been assigned to the said Mary Helen as her dower in the estate of Augustus Alston, dec'd. Mary Helen Alston, in anticipation of said marriage with Sampson H. Butler and with the consent of said Butler, also executed a deed whereby she conveyed twelve slaves for the benefit and advancement of her children by Augustus Alston, viz: said Joseph and Henrietta.

The slaves mortgaged by Augustus Alston to the Bank, those conveyed by Mary Helen for the benefit of Joseph and Henrietta Alston and those mentioned in the deed of trust or marriage settlement, all went into the possession of Sampson H. Butler after his marriage with said Mary Helen.

In March, 1848, Sampson H. Butler died, having made a will by which he appointed James E. Broome one of his executors and testamentary guardian of his children by



the marriage with said Mary Helen, and about a month thereafter the said Mary Helen died intestate leaving three children by her marriage with said Butler, two of whom subsequently died in infancy, leaving the appellant, Sampson Butler, who is still an infant, as sole surviving issue of the marriage.

No administration *de bonis non* was granted on the estate of Augustus Alston after the death of Mary Helen until the year 1857, when, on the application of the appellee, Joseph H. Alston, letters of administration *de bonis non* were committed to him by the Judge of Probate of Leon county.

Augustus Alston in his life time had contracted with Noah H. Thompson to sell to him the lands of said Alston mortgaged to the Union Bank. After the death of Augustus Alston said Mary Helen, as administratrix, executed a conveyance to said Thompson, intended to be in pursuance of said contract of her intestate, and afterwards said Thompson executed a mortgage to the Union Bank for an amount embracing, as is alleged, the stock standing in the name of Augustus Alston and twenty other shares standing in the name of one George W. Daniels, and which mortgage, covering the Alston lands and the Daniel lands and divers slaves of said Thompson, was acknowledged of record and caused to be recorded by said Thompson. It was contended that Thompson had engaged by said contract to substitute his mortgage for that of Alston, so as to relieve the Alston negroes from the liens of the Bank, and that the execution by Thompson of said mortgage was designed and done in fulfilment of his contract to take the stock and secure it on his own land and slaves.

The stock subscribed by Augustus Alston was never transferred to said Thompson, but still stands in the name of said Alston, and the Bank refused to release the mort-

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Broome et al. vs. Alston, adm'r.—Statement of Case.

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gage executed by Alston to secure the same. In November, 1855, James E. Broome procured an assignment of all the claims of the Bank against the Alston lands and slaves and the Daniel lands and an assignment of the Thompson mortgage.

The bill of complaint in this case was filed by Joseph H. Alston, as administrator *de bonis non* of the estate of Augustus Alston, deceased, against James E. Broome, in which it is alleged that said Broome, being executor of the last will and testament of Sampson H. Butler, deceased, took possession of his estate and at the same time took possession of the slaves named in the deed of trust or marriage settlement and has ever since held, kept possession of and controlled the same; that he has hired out said slaves, collected and received large sums of money due for hire and has in every respect dealt with, managed and conducted himself with regard to said property as if he was legally authorized to do so, and has not accounted to any person for his acts; that said Broome did not set up any title to said slaves, but, on the contrary, at all times admitted the said property to be held by him subject to the demands of any lawful representative of Augustus Alston, deceased. The bill prays that defendant Broome may be decreed to surrender the negro slaves to the complainant as administrator *de bonis non* of Augustus Alston, deceased, and to render and account of the monies received for hires during the time he had them in possession, and that the complainant be decreed to be entitled to the benefit of the settlement with the Union Bank and to the benefit of all transfers and assignments made by the Bank to said Broome of the claims against Augustus Alston, deceased, and of the Thompson and other mortgages.

Defendant Broome, in his answer, admits, that all the slaves which were in the possession of Augustus Alston

at the time of his death were either embraced in an allotment of dower to the said Mary Helen, or were covered by liens of mortgages in favor of the Union Bank, or were embraced in the conveyance made for the benefit of complainant Joseph and his sister Henrietta; that the rest of the estate had been fully administered by Mary Helen at the time of her marriage with Sampson H. Butler, and that the estate was largely indebted to her for advances; that at that time property was much depressed, and the estate of Augustus Alston was deemed insolvent, and the property covered by the mortgage and claims in favor of the Union Bank was not at the then prices and the then value of Union Bank liabilities sufficient to discharge the incumbrances of the bank.

The answer further alleged, that it was not long after said Thompson executed his mortgage before he began to resort to all efforts to avoid taking the stock subscribed by Alston, and insisted that he was not bound to do so, and that his mortgage was without consideration and not binding; that the slaves embraced in the marriage settlement, as well as those mortgaged to the Bank, which went into the possession of Sampson H. Butler after his marriage with Mary Helen, remained on the plantation of said Butler during the year 1848; that during this period none of the creditors appeared to relieve the executors of Butler of the possession of any of this property mortgaged to the Bank, or to disencumber such property, or to assert any claim to the trust negroes, or to assume the burden of settling with Thompson or the bank and arranging the entangled affairs of this estate; that it was evident at that date that the general creditors were little disposed to enter upon a legal settlement of the affairs of the estate, and that they had little hope of realizing anything after in-

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curing the trouble, delay, hazard and expense and litigation incident to such an effort; that this defendant was appointed by Col. Butler one of his executors and testamentary guardian of his children by said Mary Helen for the especial purpose of taking care of the interest of said Mary Helen, and his co-executor, well knowing the existence of said deed of marriage settlement, sent all the Alston negroes (so called) to this defendant, from Madison into Leon county; that the slaves embraced in the marriage settlement and covered by the mortgages of the Bank this defendant kept in possession and has hired them out annually by private hiring and with a view to the comfort and happiness of the slaves as well as to make them profitable, but this defendant denies that he received the possession of said slaves in any other manner than as guardian of the interests of the family of the late Mrs. Butler or with any other view than to devote his efforts to make some arrangements to further their interests; that this defendant is advised (although he did not, under the necessities of the case, form for himself any opinions on the subject which controlled his action) that it was his duty, under the marriage settlement, to take and hold possession of the property therein conveyed, and not to surrender the same without the direction and order of this Court, and that this defendant was bound to use all efforts to disencumber, for the benefit of the beneficiaries, all the slaves in said deed mentioned which were in the mortgage to the Union Bank; and defendant insists, under the facts of the case, that he was no volunteer or executor *de son tort*, or trespasser, so as to subject him to the displeasure of this Court and its condemnation, but that, on the contrary, he was the representative of infants, acting under the injunction of the highest obligation as well as under a positive appointment as trustee, seeking to do the best he

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could for the orphans committed to his care; and this defendant, as now advised, insists that said deed of marriage settlement did pass an adverse title and possession to defendant and those beneficially interested, and that said settlement was made upon valuable consideration and in good faith and with the honest impression on the part of the parties to the marriage that said Mary Helen did own said property and could convey the same as in and by the said deed of settlement the same is conveyed; and this defendant prays the benefit of the lapse of time in favor of the adverse possession acquired by said Butler under said trusts from the day of the date of said deed.

And, further answering, this defendant says, that after he came to the possession of said slaves nobody appeared to lay claim to the same except the Union Bank of Florida, whose encumbrances were sufficient to exhaust the mortgaged property, and which said Union Bank of Florida, as this defendant was informed and believes, contemplated a transfer of its claims to effect a settlement, or some other movement with a view to the same object; that the transaction with Thompson referred to and the giving of the mortgage by Thompson raised a question whether the Bank could further claim a lien upon the Alston negroes under the Alston mortgage; that this defendant, under such state of things, did not feel authorized to fold his arms in indifference and suffer the property to be sacrificed for the want of an effort to do something for the children, but, on the contrary, felt himself authorized to press upon the consideration of the officers of the Bank the claims of the children of Augustus Alston and did urge upon the Bank the necessity of and propriety of making some arrangements for their benefit; that under the strong appeals made by this defendant, the President, Col. Gamble, agreed to the transfer for their benefit by a verbal ne-

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negotiation made in May, 1850, by which defendant was to secure the payment of the amount agreed on, upon good security, to be supplied by defendant, all the claims of the Bank against the Alston land and slaves; and the Thompson mortgage, to be assigned without further consideration that this defendant might litigate or settle with Thompson; that when these negotiations came to be closed formally in January, 1851, it was discovered that the Thompson mortgage embraced other stock and other property, and the President required this defendant to make further provisions for the Daniel's stock and stock note; that all that was to be added to the fund by such further additional liability was 160 acres of land, not then supposed to be worth \$3 per acre, and which were in the adverse possession of said Thompson; that this defendant was not ready to assent to this unexpected demand and the negotiation was postponed (delayed but not abandoned) until the 17th day of November, A. D., 1855, when this defendant procured an assignment of all the claims of the Bank against the Alston land and slaves and the Daniels land and assignment of the Thompson mortgage; that the consideration specified was intended to provide the sum of \$16,600 of territorial bonds, endorsed by the Union Bank, and the sum of \$24,382 in the ordinary liabilities of the Bank, and is protected by a mortgage on the individual estate and property of this defendant; that this negotiation was not begun nor made by this defendant, assuming to act as representative of Alston's estate, as in said bill is alleged, but was instituted for the exclusive benefit of Joseph and Henrietta individually, for whom this defendant felt authorized to make the best arrangements he could, and was concluded for the benefit of Henrietta and this defendant as assignee of the interest of said Joseph; that this defendant is now

advised, that, under the construction given to the deed of marriage settlement by his solicitors, the said Sampson Butler may lay claim to participate in the benefit of the negotiation, at least to the extent of the property embraced in both mortgage to the Bank and marriage settlement.

Afterwards, William Fisher, and Henrietta his wife, formerly Henrietta Alston, and Sampson Butler, by his next friend on their petition, were, by order of Court, made parties defendant in this cause.

On the 4th day of October, 1858, William Fisher and wife and Sampson Butler, by his guardian *ad litem*, filed their several answers, in which they claim the benefit of the said deed of trust or marriage settlement, insisting that the same passed a good title to James E. Broome as trustee, and that they, as *cestui que* trusts, are entitled to the beneficial interest in the property therein conveyed to the total exclusion of complainant as administrator *de bonis non* of the estate of Augustus Alston, dec'd. With reference to the purchase made by James E. Broome from the Union Bank, they claim that it was made by said Broome, not as representative of the estate of Alston, but, in virtue of his relation to the children of said Mary Helen, as their trustee and friend; Sampson Butler claiming that the benefit and advantage thereof should be held to enure to his *cestui que* trust, and Wm. Fisher and wife claiming that the said purchase should enure to said Henrietta Fisher jointly with Joseph H. Alston. They further alleged, that the said Mary Helen, in the progress of her administration of the estate of Augustus Alston, made large advances of money belonging to herself in payment of the debts of said estate; that these sums are believed to have exceeded the value of the slaves appropriated to herself in payment thereof and conveyed by her to said Broome by

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said deed of marriage settlement; that by reason of such advances her title in equity became good to said slaves, or, at least, so many thereof as were of value sufficient to refund said advances.

On the 12th day of October, the Court below rendered a decree declaring the deed of marriage settlement void, and that complainant was entitled to the possession of the slaves therein conveyed as assets of the estate of Augustus Alston, dec'd; that defendant Broome render an account of the profits of the said slaves and for all his dealings with respect thereto, and that complainant was entitled to the benefit of all purchases made by said Broome of all claims against the estate of Augustus Alston and of all contracts entered into with the Union Bank in respect to any claim or debt held by said Bank against Augustus Alston, dec'd, and also to the bond and mortgage of Noah H. Thompson assigned to said Broome.

From this decree defendants appealed.

*Archer & Pöpy* and *R. B. Hilton* and *H. A. Corley* for appellants.

*W. G. M. Davis* and *D. P. Hogue* for appellees.

PEARSON, J., delivered the opinion of the Court.

Joseph Alston, administrator *de bonis non* of the estate of Augustus Alston, deceased, seeks by his bill to recover the possession of certain slaves, with an account for their hire, conveyed in a deed of marriage settlement by Mary Helen Alston, the widow and first administratrix of Augustus Alston, deceased, to James E. Broome, as trustee, for the uses therein declared, in consideration of an anticipated marriage on her part with Sampson Butler. These slaves consisted of those allotted to the widow Alston as her dower or statutory portion of her husband's slaves, in

which she took a life estate only, a part of which were subject to a mortgage made by him in his life time to the Union Bank of Florida. This deed of settlement bears date the 29th December, 1843, and soon afterwards the contemplated marriage took place; but the slaves did not go into the actual possession of Broome until some short time after the death of Butler, which occurred in March, 1848, his wife dying about a month thereafter.

To the slaves mentioned in this deed of marriage settlement Mrs. Alston had two separate and distinct titles: to the slaves allotted her for dower an independent life estate in her own right, and, in addition thereto, in her character as administratrix, she held the legal title to the reversion and the equity of redemption of those mortgaged to the Bank. All the interest, then, attempted to be conveyed by this deed of marriage settlement belonged to the estate of Augustus Alston, except only her life estate in the slaves allotted to her under the statute in the nature of dower; and yet she contracts in her private right and character and without reference to her power or authority as administratrix to dispose of all these interests, and that too upon a consideration, however good and valuable in law, moving to her solely and in no wise to the estate of her intestate. Merely to state this point is sufficient to settle it. The numerous cases we find in the books of the mal-administration of assets and misapplication of funds seem to arise where the administrator acted or contracted in virtue of his character of administrator. Such cases have nothing to do with the question involving the validity of this deed. Here was an evident attempt to dispose of the assets of the estate in her private right and for her private use and benefit without the slightest reference or resort to her official character and authority. To allow such a procedure to stand would be to annul all distinc-

tions between the property of the estate of an intestate and that of his administrator, and to go back to the dogma which prevailed in the ancient times of Mr. Justice Buller, who held that the property of an estate in the hands of an administrator to be administered might be taken in execution for his, the administrator's, private debt. This extreme doctrine was very soon modified by the good sense of the English Judges, and modern adjudications have rendered the whole doctrine conformable to principles of reason and justice. This deed, therefore, must be considered as absolutely void in so far as it attempts to convey any portion of the estate of Augustus Alston.

- The legal title remained in his estate and was succeeded to by his administrator *de bonis non* as a portion of his effects unadministered. This suit may, then, be well maintained by this complainant, and it only remains to examine what are the defenses presented on the part of the defendants for the consideration of the Court.

It is alleged in the answer, amongst other objections to the complainant's claims, that Mrs. Alston was in advance to the estate of her intestate to the full amount of the value of all the interests of the estate disposed of by her in the deed of marriage settlement. The proof of this, it is alleged, was of record in the Probate Court, and would have been presented to the Court but for the fact that the case was not set down for argument after Fisher and wife and Sampson Butler had, upon their petition, been made parties to the bill. Mrs. Fisher was a daughter of Mrs. Butler by her first marriage with Alston, and Sampson Butler a son by her last marriage with Butler. Upon the hearing of their petition to be made parties counsel was heard, it was admitted, at bar, in explanation of their rights and interests. Their application being allowed, they were made parties, and within eight days thereafter

the Court proceeded to pronounce its decree without notice to them. It does not appear from the record that the case was set down for argument, and the only evidence therein that these new parties were heard upon the merits is the recitation in the usual and formal manner at the beginning of the decree that the parties had been heard by their counsel. This, it is contended, is mere form and was not intended to and does not preclude these parties from adducing such evidence as they may think proper in support of their claims. It may be so, and, in a matter of such doubt, we think they ought not to be debarred from the adduction of their proofs and a full hearing upon the merits.

If the fact should turn out, as stated in the answer, that Mrs. Alston was in advance of the estate of her husband as administrator to the full amount of the assets of the estate disposed of by her in the deed of settlement, we will not decide in advance what effect it might have upon the validity and effect of that deed; but, in any event, whatever amount, if any, may be found due her from the estate, that will enure to the beneficiaries under the deed.

There is another and very sufficient ground upon which the decree in this case should not be permitted to preclude the distributees of Mrs. Alston from a full hearing upon the merits. By a rule of this Court, adopted in 1854 and published in an appendix to the fifth volume of Florida Reports, it is provided "that decrees, whether final or interlocutory, not embracing orders of course, shall be upon notice to the parties or their attorneys before making or pronouncing the same, and a statement by the Judge to the effect that notice has been given, shall be sufficient evidence thereof." It does not appear in any wise that this rule has been complied with, and the parties complaining

of the decree may well claim to have it opened upon this account.

It is further objected, that the complainant should not be permitted to proceed with this cause, because he does not allege in his bill that he was prompted by persons interested in the estate of Alston, or moved by a personal interest or a sense of official duty, and the authority of Lord Eldon, in 17 Vesey, 171, and that of Chancellor Harper, in Riley's Chan. Rep., 35 and 36, are quoted with much force upon this point. We think, however, that this case does not fall fully within the rule laid down by these eminent Chancellors. The rule seems to be founded upon two elements: the lapse of time, rendering the demand stale, coupled with the absence of any apparent necessity on the part of the administrator to prosecute the suit. Ordinarily, there is no legal necessity for an executor or administrator to show in whose behalf he seeks to obtain a recovery in behalf of the estate he represents. He is charged with the collection of the assets of the estate, and, to the extent that he may realize them, the law imposes the duty of responding to the claim of creditors and distributees; and it is only in cases where, from lapse of time and other circumstances, there is reason to believe that the estate has been settled to the satisfaction of all parties interested, as evinced by their long acquiescence, and, the suit appearing unnecessary, that the Court would apply the rule. In this case, it does not appear that the creditors, if there be such, have acquiesced in the settlement of the estate for any considerable length of time, it appearing from a statement filed in the Probate office and made an exhibit here in the answer of defendant Broome that many of the creditors of the estate sued and obtained judgments at law during the administration of Mrs. Alston, and it can well be conceived that they were pre-

vented from further proceedings by the circumstances in which the estate stood. A part of the property here sought to be recovered was subject, in the first instance, to Bank mortgages, while the whole was subject to the life estate of Mrs. Alston under her allotment of dower, as regulated by our statute. Under such circumstances, a creditor could have had but little encouragement to press his claims. We think, therefore, that this case is distinguishable from those to which we have been referred, and that the complainant should not, on this account, be estopped from proceeding with his cause. In this connection, it was urged that the creditors should have themselves complained, or should now be called in; but we see no necessity for this, and consider that it would be a work of supererogation, since they are already represented by the administrator *de bonis non*, who is accountable to them in the due course of his administration.

The statute of limitations has also been set up as a bar to the complainant's recovery. We think, however, that the defendant Broome does not stand in a position to avail himself of this defence. If the deed of settlement had been valid, he might, perhaps, have set up an adverse possession as trustee against all others save the beneficiaries under that deed; but that conveyance being void and the title to the property therein conveyed remaining in the estate of Alston, the law raises a trust in him in behalf of those interested in the estate, upon the broad general principle that equity will follow trust property into whatsoever hands it may be found and subject it to the trusts originally existing concerning it. Broome, then, becomes a trustee in so far as the property in his hands is concerned. For those interested in the estate of Alston, his possession was in effect their possession, and he may not claim as against them the lapse of time to give him title.

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It is further objected, that the complainant had adequate remedy at law in this case. If this be so, it does not necessarily follow that the jurisdiction of the Court of Chancery is ousted.

In the view which the Court has taken of the deed of settlement, Broome is clothed with the character of a trustee in regard to the property of the estate of Alston found in his hands, and is required to account for the same, with its income. Matters of account are one of the ordinary sources of equity jurisdiction, because of the greater facility and more improved methods of taking the account. But this question is so fully settled by a majority of this Court, in the case of *Linton vs. Walker*, that it is useless to enlarge upon it here. In that case, a suit at law was dismissed, because, in the opinion of the Court, chancery afforded a more appropriate method of adjusting the accounts, and the fact that this property was encumbered by mortgages to the Bank affords another ground for invoking the chancery jurisdiction.

It appears from the bill and answer, that Broome, while acting under the deed of trust, purchased, avowedly for the benefit of the beneficiaries under the deed of marriage settlement, certain mortgages and judgments from the Union Bank of Florida, with the intention, as he declares, of disencumbering the trust property in his hands from those liens. These purchases, it is stated in the bill and affirmed in the answer of Broome, were made with his own means, he having substituted mortgages upon his own property in lieu of those which had been given by Alston in his life time to the Bank. It is probable that the skill and credit of Broome, together with the orphan condition of the children he represented, may have had much influence in effecting favorable arrangements with the Bank in their behalf; yet the benefit of these pur-

chases and arrangements is now claimed for the estate for Alston, upon the suggestion that Broome had or should have had funds arising from the hire of the negroes in his possession sufficient to have accomplished his purposes. It must be considered, however, that there were other claims upon the fund arising from the trust property on his hands, to-wit: charges incident to the care and management of the property itself, to say nothing of the support and maintenance of the children for whose use it had been conveyed to him. There is no reason to suppose that he would have encumbered his own property to effect his beneficent object, provided a convenient fund had been at his disposal applicable to such purpose. If in fact funds arising from the property of the estate of Alston had been applied to the purchase, the principles of equity might have made the purchase enure to the benefit of that estate; but this was by no means the case. Broome declares in his answer that he had no participation in the preparation of the deed of settlement under which he acted; that he knew nothing of it or of its contents until it was brought to him for his signature while lying on a sick bed; that these orphan children were committed to his charge by his sister-in-law in her dying moments, and that all his efforts had been directed to save something for them from an estate which the exhibits filed in the case show was irredeemably insolvent. His purchase of these Bank securities was unquestionably with this view and to this end.

He had no general connection with the estate of Alston and was responsible to it in no wise beyond the liabilities cast upon him by reason of the trust under which Mrs. Alston held the property. He acted not for the estate of Alston, nor with its funds, but solely with his own means, in behalf of the children whose charge he had accepted. To divert the skill and credit thus employed from the true

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and beneficent channel in which it was intended to flow, to objects indifferent to him, revolts all human sentiments as well as every principle of equity and good conscience, which can never permit the estate of Alston to speculate upon the well meant charities of a stranger to it. The entire benefit, therefore, of these purchases must enure to the children of Mrs. Alston, afterwards Mrs. Butler, (Joseph and Henrietta and the infant Sampson Butler,) the beneficiaries in the marriage settlement, in whose behalf Broome, the Trustee, declares that he acted.

Broome must account strictly to the estate of Alston for the negroes received by him as trustee under the deed of settlement, but, in so doing, he is to be allowed, upon the principles recognized and established in the late case of *Linton vs. Walker*, 8 Florida Reports, all reasonable disbursements and charges incurred in and about the care and management of the property.

The decree of the Chancellor herein is therefore reversed, set aside and reformed so far as to conform to the principles laid down in this opinion, and the cause remanded for further proceedings not inconsistent therewith.

BALTZELL, C. J., dissents from so much of the opinion of the majority as asserts the deed of Mrs. Alston void. He regards it but as a transfer of the dower right and interest in the life estate, as conveying nothing else and as good for this purpose.

The purchase of Broome from the Union Bank he regards as made for the estate—so much as relates to the personality for the administrator and as to the realty for the heirs. Broome is a trustee as to this and the other property, not by any declaration he may have made of his purpose or design, but through his interference with the property of the estate.

JOHN H. GEIGER AND OTHERS, APPETLANTS, VS. JAMES  
FILOR AND OTHERS, APPELLEES.

- .1 The law of 1856, to benefit commerce was not designed to give to the original proprietor of a city, or to the vendees of his right to the streets, the land between high and low water mark at their termination. By the law, this belongs to the city so long as the street exists, with a right to the owners of lots afterwards on its abandonment.
2. Neither railroads nor wharves are nuisances *per se*. They may become so without proper regulation or restriction.
3. Wharves may be constructed by a city, either by direct construction on its own part or by contract with others, giving them the revenue for a period of time to compensate for the erection.
1. An injunction refused, under the circumstances of this case, to the erection of a railroad and wharf.

This case was decided at Tallahassee.

Appeal from Monroe Circuit Court.

On the 28th day of November, 1854, a contract was entered into between the city of Key West, by John W. Porter, Mayor of said city, of the first part, and John H. Geiger, D. Davis and Hiram Benner, of the second part, as follows, viz:

“That the said party of the first part do hereby grant unto the party of the second part, their administrators and assigns, the privilege and use of the westerly end of Green street, on the Island of Key West, for the purpose of building a city wharf, extending to the channel of the harbor, together with the privilege of laying and using a railroad track from said wharf along said Green street to the junction of Duval street, for the better convenience of transporting goods, in connection with the privilege of said wharf; that the building of said wharf shall be commenced within six months from the date hereof, and that the said party of the second part, their administrators and

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assigns, shall be entitled to all the emoluments arising from wharfage, rent, or other legal income of said wharf and privileges, for the term of ten years; and the said party of the second part, in consideration of the foregoing privileges, do hereby bind themselves, their administrators and assigns, to deliver said wharf to the said party of the first part, at the expiration of the aforesaid term of ten years from the date hereof."

Afterwards, a petition of sundry citizens of Key West was presented to the City Council, praying that the resolution and action granting said lease (or agreement) be rescinded, and that they cause the lessees (or parties obtaining the privilege therein granted) to be notified thereof; in which petition they allege, among other things as grounds for the prayer thereof, that at the meeting of Council on the 27th of November, 1854, at which all the Aldermen were not present, the resolution making said grant was passed, for which no valuable consideration was to be made; that the said lease was made without notice to the public, without consideration and only seven days before the day of election for a new set of Aldermen and Mayor, and bears upon its face manifest injustice to the city; that the Mayor and Aldermen had exceeded their authority in the making of said lease, and, if the design of obstructing the streets in such manner be persisted in, the citizens at large will entirely lose the use and benefit now derived from their existence. The appropriation of said streets to private use will be in violation of the faith upon which all sales of lots upon it were made and would be as illegal as it was injurious.

The subsequent Council, to whom this petition was presented, adopted the following resolution:

*Resolved*, That there is no power vested in the Mayor and Aldermen to grant said lease; that they should have



consulted the people as to the expediency and propriety, and should have given due notice thereof, in order that an opportunity might have been offered for fair and open competition; that they have no right to select individuals amidst citizens and grant them, without notice, peculiar privileges, to the common injury of all. And we believe, under existing circumstances, if these streets be diverted from the people to the purposes of private gain, the citizens will utterly lose the use and benefit of the streets. We deem it our duty to express our dissent to the same by declaring that the lease signed by John W. Porter, Mayor of the city, on the 28th day of November last, be and the same is hereby declared null and void and of no effect whatever; and, should the said parties, or any of them, attempt to obstruct the said street or streets by virtue of the power pretended to be vested in them by said lease, then the city authorities shall use all lawful means to prevent them.

The Island of Key West was originally granted by the Spanish crown, in absolute property, to one Juan P. Salas and by him sold to John W. Simonton, a citizen of the United States. The said grant was afterwards confirmed by commissioners duly appointed by the Government of the United States. In laying out the city of Key West, the proprietors did not make to the city any conveyances of the streets, but left unsold and unoccupied certain highways, to be used as streets, retaining in themselves the title and fee simple ownership. Green street is one of the highways left unsold, the fee in which remained in the proprietors of the Island. This street runs to and connects with the waters of the harbor. Afterwards, the fee in Green street, which had remained with the proprietors of the Island, was conveyed in trust for the benefit of Jas.

Filor and the other complainants, from a point twelve feet above high water mark, in a direct line, to the channel of the harbor.

James Filor and others filed their bill of complaint against John H. Geiger and others, praying that the defendants may be enjoined from proceeding to erect, construct and build a wharf at the end of said Green street, or from laying a railway along said street, or in any manner obstructing the free and unrestrained enjoyment of said street in its use as a street or highway, and that the lease granted and agreement made by the City Council with the defendants be adjudged illegal and void. The bill, among other things, alleges, that the complainants, who are owners of the soil on the Southeast side of said Green street, became the purchasers in reference to the benefits and advantages arising from its location on said street, and that to lay a railway along said street would be to defeat the objects for which they made the purchase, to greatly injure and impair the value and desirableness of their property and otherwise greatly to injure and oppress them; that at the present time a city wharf is wholly useless and unnecessary; that there are now in the city of Key West more wharves than the conveniences of the corporators and citizens and the wants of commerce require; that the said wharf, if constructed, will pass into the hands of private individuals for the term of ten years, then only to be given up for the benefit of the citizens and corporators; that during that entire period the citizens and corporators are to be deprived of the use and enjoyment of said street, to be repaid by the uncertain benefit to be derived from a wharf that may, when possessed, be utterly valueless and unnecessary.

The bill further alleges, that the said City Council had no right, power or authority to divert the use of the said

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street and highway from the public to private purposes without the consent of the corporators, or a majority of them, and without securing to the corporators an adequate consideration and benefit for the privilege granted; that said City Council have improvidently granted to the said parties the privilege for the period of ten years without securing to the city any guarantee as to the nature and character of the wharf to be erected and constructed; that Green street is only fifty feet wide, and the said parties will be unable to erect a wharf for any useful purpose without encroaching upon and invading the rights of your orators, the owners of the soil on the one side, or of the United States, the owners and occupiers of the soil on the other; that the said contract made and entered into by the said City Council does not secure to the city of Key West the erection and construction of a permanent, useful and durable wharf, to be approved of and accepted by the city, nor does it provide for the reconstruction of said wharf in the event of fire or destruction by storm; that no adequate security is taken from the parties for the faithful execution and performance of their contract, and, after ten years enjoyment of the privilege granted, the city may find itself without a wharf, or with one of little or no value.

In a supplemental bill filed by complainants, they allege that said John W. Simonton and others, who purchased the Island from the Spanish grantee, established lots, squares and streets, sold said lots with reference to said streets, whereby said streets were dedicated to public use; but that said proprietors and town-makers did not convey any title whatever in or to the said streets, and that, notwithstanding the growth and progress of said city of Key West, the fee simple title in and to all those lands used as streets remained in the said Simonton and his

associates, who held the Island and city with him; but that, long after the establishment of said town, to-wit: in the year one thousand eight hundred and fifty-five, the heirs and assigns of John W. Simonton and of said owners of said Island and city, did sell and convey unto your orators, for a valuable consideration, the fee simple title of, in and to the streets of the said city; that the pretended grant by the City Council to the defendants, by diverting the said street from the public use, to which it had been dedicated by the aforesaid Simonton and his assigns, and granting it to a private use, was in effect the surrender of the franchise and use of said street to the original proprietors, who had never parted with the fee thereof, in fraud of the rights of the corporators, and that a new City Council, elected subsequent to said grant, upon the petition of certain corporators of said city, did annul and cancel, after full, deliberate and patent investigation thereof, the aforesaid grant to the defendants, of which the defendants had due notice before they had in any way proceeded under the said grant; that your orators are the true legal and *bona fide* owners of the fee simple of all the lands in the city of Key West, in Green street and its other streets, which lie between low water mark and a line drawn twelve feet above high water mark, and are entitled to have, exercise and enjoy all the rights, privileges and immunities thereunto belonging as fully as were the original proprietors of the said city aforesaid; that the Legislature of the State of Florida, in December, 1856, passed an act granting certain rights to riparian owners of land within the State, and that under and by virtue of said act they, as riparian owners, are the legal owners of all land at the Westerly end of Green street from high water mark to the inshore edge of the channel, under the waters of the harbor of Key West.

The defendants, in their answer, allege, that other citizens of Key West, who have not complained of the said wharf and railway, own a large majority of the land on both sides of Green street; that defendants themselves own much more land fronting on said street than complainants. They also allege, that the grant did secure a guarantee, and an adequate one, as to the return of said wharf; that, although Green street is only fifty feet wide, they allege that they can construct a permanent and useful wharf without encroaching upon or invading the rights of complainants, or of any one else. They deny that any authority other than the State can convey a right to the soil covered by tide waters. They deny that the grant to them diverted the use of said street from the public to private purposes, or that the contemplated wharf and railway, or either of them, would operate as an injustice or hardship to the legal or equitable rights of any person, or that they would prove an obstruction to Green street. They assert that the building of the wharf is necessary, and, so far from trespassing on the rights and privileges of complainants, would enhance the value of all the lots on said street, and, instead of abridging, would enlarge the public use and benefit. They insist that the original grant was absolute and irrevocable by a subsequent City Council.

W. H. Von Pfister, George W. Watson, Benjamin Sawyer, R. L. Hicks, William Hemp, witnesses examined on the part of defendants, all testified, that in their opinion, the building of the wharf and railway would increase the value of the property on Green street.

It also appears from the testimony, that a grant to the United States to build two similar railways had been made by the City Council.

The Court below, after the final hearing of the case, de-

creed the injunction which had been granted on the filing of the bill of complaint to be made perpetual, but further ordered that the defendants were not to be thereby barred of any action for damages they may have sustained by the suing out of the said injunction.

From this decree the complainants, as well as the defendants, appealed.

*O. B. Hart* for Geiger and others.

*Archer & Papy* for Filor and others.

BALTZELL, C. J., delivered the opinion of the court.

Railroads in cities or towns cannot with propriety be termed nuisances. They are decided not to be such in numerous cases, both by English and American Courts. They are in use in the principal cities of Europe and this country, and, when regulated by proper restrictions, are valuable aids to commerce. Nor could it well be otherwise. A road of this kind presents but a smoother surface for a wagon or carriage than that which prevails in the adjacent part of a street, thus giving facility instead of raising obstruction to the movement of produce or the transfer of passengers. Nor are wharves necessarily nuisances, as the definition of the word shows: "A sort of quay, constructed of wood or stone, on the margin of a road-st ad or harbor, along side of which ships or lighters are brought for the sake of being conveniently loaded or unloaded. Where the water is shallow near the shore, neither passengers nor goods, without their aid could be conveyed to or from the land or sea without great trouble, inconvenience, delay and expense. They are indispensable to commerce, and no city or town in the present advanced state of commerce, having navigable facilities, could be without them. What would be the position and situation of Key West, an

island in the great ocean, without her admirable and convenient wharves, giving free ingress and egress to her citizens and strangers from all parts of the world and affording almost unequalled facilities for loading and unloading vessels of the greatest burthen? It is true that these, like all other blessings, may be converted into injuries or subjects of offence. So wharves may be made or may become nuisances. They may extend too far into a narrow channel, so as to obstruct the free passage of vessels, or may become decayed or be the means of collecting filth. The first of these, it is presumed, could not arise at Key West, the bay or broad open sea being the channel, and, as no wharf has been constructed as yet, the other objections cannot apply.

It is, perhaps, sufficient to say, in reference to this question of nuisance, that the Court below intimated a design and offered to direct an issue of fact to ascertain whether the construction of the proposed wharf and railroad would be injurious to plaintiff. This much is apparent by the record. Five witnesses on the part of defendant speak of the effect of their construction as calculated to "increase the value of complainants' lots and property," "as of benefit to all," "as having a good effect," as of no "damage to property in the street," as no disadvantage to it, "as of no detriment," "as beneficial and advantageous." These are the opinions of witnesses on inspecting the plan of the proposed structures, and not a witness proves to the contrary. It appears, too, that the General Government have a wharf and railroad track passing through Green and other streets of the city, by permission of the City Council, and without opposition from any one. The allegation, then, as to the injurious character of these structures must be regarded as disproved, if not abandoned, by this rejection of the offer to try the issue. Complainants themselves

would seem to have apprehension of their case in this respect, as they obtained leave and filed a supplemental bill asserting another and distinct ground of relief: "That one Simonton, the original owner of the soil on which the town was laid out, established lots, squares and streets, and sold said lots with reference to said streets, whereby the streets were *dedicated* to the public use, but that said *Simonton* did *not convey any* title whatever in said street; that the title in and to the lands used as streets remained in said *proprietor*, who conveyed, for a valuable consideration, the fee simple of, in and to the said streets of the said city to complainants; that this pretended grant by the City Council to defendants, by diverting the street from *public use*, to which it had been *dedicated* by the aforesaid Simonton, and granting it to a private use, was in effect a *surrender of the franchise and use of the said street* to the original proprietors, who had never parted with the fee thereof, in fraud of the rights of the corporators, and that a new City Council did annul and cancel the grant to the said corporators, after full investigation thereof, with notice before they had proceeded under the said grant; that they (complainants) are the true, legal and *bona fide* owners of the fee simple of all the lands in the city of Key West, in Green street and its other streets, which lie between low water mark and a line drawn 12 feet above high water mark, and are entitled to have, exercise and enjoy all the rights, privileges and immunities thereunto belonging as fully as ever the original proprietor of the said city. Further, that the State being the true and lawful owner of the line of land between high and low water marks, and, consequently, of the position claimed as a wharf, in December of the year 1856, passed a law surrendering to the proprietors, and that complainants are now owners by title duly derived from them."

If the proof had not been so clear that there was not a nuisance if indeed there was one as complained of—it would not produce a forfeiture of the franchise. This is fully established by the authorities. An abuse of the power of the City Council could easily be prevented by the Courts, without devolving upon the city or its inhabitants such injury and loss to the public as would ensue from closing an entire street so as to make it private property. The remedy for obstructing a street is by indictment, injunction, action on the case, &c.—Angel on High., 222.

Dismissing this view of the subject, we proceed to the case made out by the supplemental bill, setting up a right in the land in front of the end of the street, covered by water, through and under the act of the Legislature. To understand this fully, it will be necessary to arrive at the state of the law existing previous to and at the time of its passage. By the civil law in force in Spain and the colonies, whence the right of the proprietors of the town was derived, “the use of the shore (that is, of the land) that is usually overflowed by the highest tide, by the law of nations, is public in the same manner as the sea.”—Angel on Tide-waters, 18, 68. “Any person was at liberty to place a cabin there to harbor himself, and, for a like reason, to dry nets and drag them from the sea.” *Ibid.*, 19.

“The claim of the citizens and inhabitants of a State or country to the free use of the waters of the sea and their shores for private advantage, is so obviously dictated by the law of nature, that in the first ages of all countries, they have been left open to public use. It is either so directed by the positive codes of law or so made obligatory by the acknowledged customary or common law of every enlightened nation. Thus, under the jurisprudence of Jus-

tinian, these were held natural rights and common to all; the air, running water and the sea, and hence the shores of the sea. Nobody is therefore prohibited to come to the sea shores, and all rivers and ports are public, so that the right of fishing in a port is common to all.”—Angel, 18.

The common law of England is said by this writer to be at variance with the civil law in this, that they make such waters “the property of no one.” The policy of the common law is to assign to everything capable of occupancy and susceptible of ownership a legal and certain protection, and accordingly make these things, which, from their nature cannot be exclusively occupied and enjoyed, the property of the sovereign. The King, in England, is regarded as the universal occupant, and the presumption is that all property was originally in the crown. The right of property in the tide-waters of England is, moreover, vested with the King, not merely on the principle that he is the universal occupant, but on the principle that he is the fountain from whence, in contemplation of law, all authority and privileges proceed.—Angel, 19, 20.

To the King of England is, therefore, not only assigned the sovereign dominion of the sea adjoining the coasts and over the arms of the sea, but in him is also vested the right of property in the *soil thereof*.—Angel, 20.

“The King holds this, not as his own private property, but for the public and as trustee to preserve and maintain it for the use of his Majesty’s vessels and others, to secure to his subjects the free and uninterrupted use of these inherent privileges of navigation. They are of common right, public, as by the civil law, for every subject to navigate upon and to fish in without interruption. And although the right of property in the soil covered and flowed by these waters is in the King to high water mark, yet the shore on the land between high and low water mark is also

of common right public. The King has the property, but the people have the use necessary. The free and uninterrupted enjoyment of these is deemed an inherent privilege. The rights thus denominated are of navigation and fishery, and classed among those public rights known as *jura publica* or *jura communia*, as contradistinguished from *jura coronae*, the private rights of the crown.”—Angel 23.

The subject is still further illustrated in the work quoted, under the head of *purprestures*, &c. :

“By the civil law, to repair and strengthen the banks of public rivers is permitted as being most useful, provided it does not impede navigation. Against one who projects a wall into the sea, the indictment lies by one who is thereby injured; but, if no one sustains injury, he who builds on the sea-shore or projects a wall is protected.” Angel on Tide-waters, 19.

“Nor by the law of England is such action positively prohibited. Such encroachment may or may not be a public nuisance. It is not every building below the high water mark, nor every building below the low water mark, that is *ipso facto* in law a nuisance; for that would destroy all the keys in all the ports of England; for they are all built below the high water mark, for otherwise vessels could not come to them to unlade. In case, therefore, of building within the extent of a port, in or near the water, whether it be a nuisance or not is a *questio facti* and to be determined by a jury upon the evidence, not *questio juris*.”—Hale de jure Maris; Hargrove’s Tracts, 85; Angel on Tide-waters, 200.

“Although not a nuisance, it may be yet a *purpresture*; in which event the Court may direct an inquiry to be made, whether it is more beneficial to the crown to abate the *purpresture* or to suffer the erection to remain and be

erected, and this is by information of *intrusion* at common law, or by information at the suit of the Attorney General in equity.”—Angel, 201.

On the change of government which took place by the treaty of Spain transferring Florida to the United States, and afterwards on the assumption by the people of a State government, the right to the shores of navigable waters and the soils under them enured, first to the General Government and then to the State, according to the decisions made by the Supreme Court of the United States in various cases before them.—See cases of 3d Howard, 219; 9 Howard, 477.

In the case of the city of New Orleans vs. the United States, which involved the question of the right of property in a quay in front of the city, claimed by the city through a dedication thereof by France and Spain, it is said: “If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the King had power to alienate it as other lands, there can be no doubt that it passed under the treaty to the United States, and they have the right to dispose of it the same as other lands. But if the King of Spain held the land in trust for the use of the city, or only possessed a limited jurisdiction of it principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty?” The question is answered by saying, “that, in their opinion, neither the *fee* of the land in controversy, nor the *right to regulate its use*, is vested in the United States.”—10 Peters, 787.

We have seen by the authorities quoted, that this land, as well by the laws of Spain as by the English law, belonged to no one, or rather, to the public at large, and that the crown of neither country could alienate it.

The question is not raised here as to the power of the

State to alienate, but whether the State has actually transferred to complainants or to the proprietor from whom they derive title. The law is entitled "an act to benefit commerce," and recites:

"Whereas, It is for the benefit of commerce that wharves be built and warehouses erected to facilitate the landing and storage of goods; And whereas, The State being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving *their water lots*—Therefore, *"Be it enacted*, That the State of Florida, for the considerations above mentioned, divest themselves of all right, title and interest to all lands covered by water lying in front of any tract of land owned by a citizen of the United States, or by the United States for public purposes, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore-bank or beach as far as may be desired, not obstructing the channel; but leaving full space for the requirements of commerce; upon lands so filled in to erect warehouses or other buildings, and also the right to prevent encroachments of any other upon all submerged lands by bill in chancery, &c.; also confirming to the riparian proprietors all improvements which may heretofore have been made upon submerged lands for the purposes within mentioned; that nothing in this act contained shall be so construed as to release the title of the State of Florida, or any of its grantees, to swamp or overflowed lands within the limits of the same, but the grant herein contained shall be limited to those persons and bodies cor-

porate *owning lands actually bounded by* and extending to low water mark on such navigable streams, bays or harbors.”—Laws 1856, page 25.

The avowed object of the law is to give to the owners of land, being riparian proprietors, in front of a navigable stream, arm of the sea, bay or harbor, the right and interest of the State in and to the land covered by water as far as the edge of the channel, and to owners who were prevented by the State’s title from improving lots so situate between them and the water. If complainants are such owners in contemplation of this law, then their case is made out. Are they such owners? They assert a dedication of the street by the original proprietors in laying out the town and making sale of the lots, and that no conveyance was made, and that the street has been subjected to a private use so as to forfeit the right to it.

The latter point we have already disposed of, and, as to the former, it is too well settled by authorities to admit of further question that a dedication without conveyance may be as good as with it. This dedication was made in 1829, and there is no evidence of a disturbance of the possession during a period of near thirty years, so that there can be no doubt of the right of the city to the street, leading to the water.—See cases of 6 Peters, 433 and 507; 10 Peters, 713; 9 Howard S. C., 10.

Yet there is an interest remaining in the proprietor of a town, or his vendees, which it may be material to enquire into still further to elucidate the subject. The owner of the land over which the highway passes retains the fee and all rights of property not incompatible with the public easement, and whenever the highway is abandoned or lost, it becomes his original unincumbered dominion.—Angel on High., 301.

The learned author, in continuation of the subject, makes these remarks:

“The rights which the ownership of the fee, where it exists, gives are subject in practice to endless modifications depending upon the exigencies of the public and the location of the highway. The more ancient decisions limited the rights of the public to that of passage and repassage and treated any interference with the soil other than was necessary to the enjoyment of this right as a trespass. But the modern decisions have very much extended the right, and, particularly in the streets of populous cities, have reduced the interest of the owner of the soil to a mere naked fee of *only a nominal value*.”—*Ibid.*, 312.

The distinction is not properly taken in these authorities, we think, between the right of the original proprietor and his vendees in the property of a street. It has not been urged here and we therefore do not think proper to decide it. It is by no means clear that this proprietor, or the vendees of this particular interest, own this right in opposition to the purchasers and owners of lots in the city. The right of the owner, as indicated by this author, is not inconsistent with the use of the land as a street. Thus, as owner, he has the right to all the trees and mines under it, (§ 302)—to dig the soil and use the timber, &c.,—the right to maintain trespass against one coming on the sidewalk and using abusive language, (§ 305)—the right to the herbage on the highway, (§ 306.) Now the right of the city, in comparison with this, is far more extensive, being that of occupancy and use for travel and transportation by the public of every various kind, all hours of the day or night, together with the duty to keep it in order and prevent obstruction to its free use, possession and enjoyment. The right of the one is instant, present, potent in all time to come, that of the other distant, uncertain, qualified, con-

tingent—so that, if it depended upon the ownership contemplated by the law, we should not hesitate to give such construction of the meaning and intention of the Legislature as to give to the city as the owner rather than to complainants. Indeed, the grant might be construed to give to each to the extent of his interest—the present right to the city, the future to complainants when the right and possession of the city is abandoned.

There are other views, of no slight interest, in connection with the subject. We have already seen that the city has been in the possession and enjoyment long enough to create a right. Be this as it may, the State does not undertake to interrupt or disturb the right of any one. It merely divests itself of its right of title, leaving the possessor undisturbed and by no means desiring to interfere with or take from a right or interest of property existing in another, more especially when such right, as in this case, of great public advantage and benefit, might force this party to a purchase of the property to answer the public exigencies, or to subject the property to uses of great, perhaps indispensable, moment and importance. To assert the contrary conclusion would be to turn and act of high beneficence on the part of the State into one of merited reproach. It would be to assert that the Legislature had trifled with the great interests of the public in one of her cities, as such grant would put it in the power of individuals to destroy the street, to defeat its main objects and purposes—to deprive the law of its principal beneficial design and character. It would be as if a power was given in one of our towns on land to block up the approach from a street to the surrounding country.

It is not difficult to see that complainants are not embraced by either the terms or the spirit of the law. There are no water lots at the ends of the streets held by them,

and they are not the riparian proprietors prevented from improving any lots there claimed by them. On a full consideration of the subject, we are of opinion that neither the complainants nor the original proprietor of the lots derived title to the land between high and low water mark at the end of the streets, from this law, and that their claim on this ground is unsustainable. Whilst such are our views on this subject, it is incumbent upon us to show how far they are supported by authorities bearing on the subject.

It has been held, says the author above quoted, that “where an act of the Legislature of New York authorized a proprietor of lands lying on East river, upon which the city of New York is bounded, which is an arm of the sea, to construct wharves and build bulk-heads in the river in front of his land, and there was at the time a public highway through said land terminating at the river, such proprietor could not, by filling up the land between the shore and the bulk-head, obstruct the public right of passage from the land to the water, but that the street, by operation of law, was extended from the former terminus to the newly made land to the water. The design of the act was to confer privileges on the owners of land adjoining the East river, but not to destroy the rights of the public to reach its waters through Warren or any other street which then led to its shore. Nor should the act be so construed as to make a public mischief, unless required by words of the most implicit and unequivocal import.”—*Angel on High.*, § 26; *People vs. Laundrum*, 5th Denio, 9.

In the plan of the town, made part of the record, which plaintiffs exhibited, the streets extend to the water and are left open there. The effect of such dedication is given in numerous cases well worthy of consideration. The case of

Blakely, &c., vs. Hemley, lessee, decided by the Supreme Court of the United States, is important as to several points involved in this case. This was a suit to recover a lot of land in the city of Pittsburgh lying between Water street and the Monongahela river. The Court say, "from the plan of the town, it does not appear that any artificial boundary, as the Eastern limit of Water street, was laid down; the name of the street was given and its Northern boundary, but the space to the South is left open to the river. All the Streets leading South terminate at Water street, and no indication is given on the plat or in the return of the Surveyor that Water street did not extend to the river. Whether Water street extended to high or low water mark can be of no importance in the present controversy. If its Southern boundary be limited by high water mark, it is clear that the proprietors parted with all their right. It is admitted by both parties that the river Monongahela, being a navigable stream, belonged to the public, and a free use of it may be rightfully claimed by the public whatever may be the extent of its volume of water. If Water street be bounded by the river on the South, it is only limited by the public right. To contend that between this boundary and the public right a private and hostile right could exist, would not only be unreasonable but contrary to law. If the jury shall find that the ground in question was dedicated to the public as a street or highway, or for other public purposes, to the river, either at high or low water mark, the right of the city will be established."

The Court below having instructed the jury that the acts of ownership (that of having wharves and a graduated pavement,) for which a tax was imposed on steamboats, were inconsistent with the rights asserted in behalf of the public, and that it could not be legally treated and used as private property, the Court say: "If this ground had

been dedicated for a particular purpose and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a Court of Chancery to compel a specific execution of the trust by restraining the corporation or causing the removal of obstructions; but even, in such case, the property would not revert to the original owner limited only by conditions imposed in the grant. It does not appear, however, that the construction of wharves on the river, and the pavement on the ground have in the least degree obstructed its use as a street. The wharves cause no obstruction to the 'use of the ground as a street, and whether the authorities have transcended their power by raising a revenue from them, is a question not necessarily involved in the case.'—6 Peters, 510.

It will thus be seen that this decision, maturely considered by the Court, covers nearly the entire ground of the present controversy. Other cases on the main point in the case have been determined by other Courts, to which a short reference will be given, re-affirming the doctrine thus laid down. Thus, in Rowan's executors vs. the Town of Portland, the Court say: "There is no line on the map of the town dividing or separating the town from the river, and, if there were, it should rather be presumed that the shore between such line and the river was thus discriminated for the purpose of showing that it was intended for some use of the town differing from ordinary streets and public grounds, and that the cross streets, at least, were intended to extend to the river at some future day. than that a town located upon the bank of such river and at a point selected for its commercial advantages should be wholly shut out from free and common access to the river. The unreasonableness of this latter presumption has been more than once declared by this Court, and

the fact that a town is laid off upon the banks of a navigable river, is held to be sufficient evidence of its extending to the water, unless a contrary intention is manifestly indicated.”—8 B. Mon., 240.

The same doctrine is held in 2 J. J. M., 224, 7 B. Monroe, 680. In the former case, the Court say: “The front street runs parallel with and near to the river. There were no lots between it and the river, but some vacant ground from this street to the margin of the river. This land belongs to the trustees, never having been sold or appropriated by them;” and, from subsequent parts of the opinion, it is evident they were considered as holding it for the benefit of the town and might obtain the grant of a ferry, of which the town should receive the profits.—8 B. M., 241.

In the city of Louisville vs. Bank of the United States, the Court say: “It would be almost as reasonable to sell and appropriate as private property the river itself as the ground lining its margin, the occupation of which would obstruct the connection between the lots and the river. The object of locating the town on the river was to enjoy the benefit of its facilities as a highway.” A similar inference of the intention to secure at all times and under all circumstances a free access to the river and an unobstructed right to the common use of its banks is stated in Kennedy vs. Covington, 8 Dana, 61; 8 B. Mon., 242.

In Godfrey vs. the City of Alton, the Supreme Court of Illinois held, that “when an easement is granted to the public upon the margin of a navigable stream, the right to use and treat it as a landing is undoubted. Having dedicated the banks of the river, this united the two easements each of which was essential to the full enjoyment of the other. The proprietors had no interest in the bed of the stream which they could reserve to the prejudice of

the enjoyment of the public easement over it.”—12 Illinois, 36.

A case of the brig *Empire State*, decided by a Judge of the District Court of the United States in Michigan, has been mainly relied upon by complainants. This asserts, that “the public streets remain as originally dedicated and no right of possession is given, and there is no transfer of the fee in them, and consequently the city cannot occupy them except for purposes of regulation either for public business or public use, or give authority to others to do so. The character of the use cannot vary the terms of the grant or convey that which was expressly withheld. Unquestionably, the city may erect at their *termini of the streets, in the river, suitable wharves or landings*, but by so doing such erections become free to the public as extensions of the streets, and the city has no authority, and can confer none, to exact tolls for egress and regress.”—1 Newbury, 550.

We are not acquainted with the reputation of the Judge who pronounced the opinion, so as to be satisfied with his decision and regard it as authority, nor is the case so treated as to entitle it to this estimation. Judges of the District Court of the United States occupy the position and station of Circuit Court Judges of the State, and have jurisdiction in some respects more extensive, in others more limited, and their decisions are entitled to about the like regard, dependent always upon the reasoning and strength with which they are supported.

For reasons already expressed, we do not assent to the view as to the effect of a want of conveyance of the streets upon the rights of a city. The power and right of a city to erect a wharf, being conceded, it seems to us that the imposition of a toll would and should depend upon a right discretion in the City Council. If they construct

wharves, it will be at the expense of the inhabitants, by tax, and no objection is perceived to an arrangement by which the public burthens in this respect may be relieved and prevented. They may, if they think it preferable, contract with individuals to erect wharves, and from the use of them in obtaining toll prevent the expense of erection to themselves and thus greatly remunerate for any outlay in their construction. It is a franchise, and should be so regarded, just as a city or town may build a market to be free to all, or with the imposition of a tax upon the vendors of articles of sale to compensate for its erection, attention, &c. We do not perceive anywhere in the examination we have made, and we have made every exertion to examine all the cases in our reach, that such rights or privileges have in any instance been denied to city authorities. The principal cities in this country and in England seem to possess and enjoy the privilege, and it would not comport with the fair and rightful exercise of these rights for municipal bodies to be debarred of their use and enjoyment. The land at the end of a street in a city, located on a water course or arm of the sea, is either shallow or has deep water near the shore. In the former case, it can be used alone by lighters and very small vessels, but even these require regulation and attention proportioned to the extent of the trade of the place. This very regulation creates expense, and what should prevent a tax or toll from those receiving the benefit of the land and of the provision for its regulation? But why should this easement be confined to small vessels and lighters—restricted to the few, when it may, by an additional expense, be made to benefit the many? Why not, by the construction of wharves, give an access to all vessels, large as well as small, thus affording facilities for the landing of passengers and to the ready transportation of

goods? If the easement exists at all, it is and should be with all the improvements that science and skill and modern art can bring to its aid.

*Quo Warranto* was brought against the corporation of Boston, in England, for demanding toll thorough. They justified the demand by reason of a consideration for repairing a bridge and pavement, and also a sea beach, and the Court held upon this, that although *toll thorough* could not be claimed as such without more, yet, as here, it was founded upon a consideration, it should be deemed good. See *Williamson vs. Jones*, 162; *Ray vs. Corporation of Boston*, Cro. Eliz., 711.

It is upon such principles that toll is exacted for passing highways, bridges, ferries, &c., which are public, and that is called toll thorough.—*Woolrich's Law of Waters*, page, 303.

This decision is independent of any statutory right. Upon common law principles, the charter of the city would but confirm the right. In the present case, a contract was made by the city with defendants to construct a wharf and a railroad track, giving them the emoluments arising from wharfage, &c., for ten years, with the requirement to return the wharf at the end of that time in good condition to the city. The allegation is that this was made without adequate consideration. There is no proof to support it, and the answer denies that the consideration was insufficient, *Prima facie* the City Council is the best judge of its own interests, and without proof of improper or injurious action on their part, there is no pretext for calling it in question by this Court. We cannot presume that they have acted improperly or have parted with an important interest, without any value.

Again, it is alleged that the City Council made the contract without notice to the citizens and against the appro-

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Robinson et al. vs. Yon et al.—Statement of Case.

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bation of the citizens. We are not aware that notice is required by law to be given of contracts made by the city, or that the assent of the citizens is required to be given to their contracts or other action. No such showing has been made to us.

It is said again, that a City Council, subsequently elected and convened, have, by solemn act and resolution of their Board, annulled, canceled and set aside the said agreement and contract made with defendants, by which they were to have privilege of constructing a wharf and railroad. It would be a curious lease, agreement or contract that one of the parties, without any provision in it giving such right, could annul, cancel and set aside. It was not a mere license, but a contract, executed by both parties and entitled to all the regard of such.

On the whole case, after mature deliberation and reflection, we are of opinion that the decree of the Circuit Court in favor of complainants, making the injunction perpetual, is erroneous and should be set aside with costs, and the case remanded, with directions to that court to dismiss the bill with costs.

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FRANCIS A. ROBINSON AND JOSEPH B. ROULHAC, APPELLANTS, VS. TERRELL, H. YON AND OTHERS, APPELLEES.

1. The act of 1844 prohibits Sheriffs' sales, except upon the four sale days therein named, provided that when the levy is upon personal property, the replevy bond required by the statute shall have been given.
2. Such bond is not necessary where the levy has been upon real estate, which is not in its nature of subject of replevy.

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Robinson et al. vs. Yon et al.—Opinion of Court.

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3. The statute of 1855 does not allow a second replevy by the sureties in the first replevy bond.
4. A Circuit Judge, under the provisions of the act of 1844, has full power either in term time or vacation, to correct, restrain and control the process of a court of law, and no resort is necessary to the powers of the Court of Chancery in such cases, unless, arising from the operation of independent equities apart from the process.

This case was decided at Marianna.

Appeal from Jackson Circuit Court.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

*W. E. Anderson and D. P. Holland* for appellants.

*A. H. Bush and Yonge & McClellan* for Appellees.

PEARSON, J., delivered the opinion of the Court.

It appears from the record in this case that sundry creditors of F. A. Robinson had obtained judgments at law against him; that executions had been issued and a levy made by the sheriff upon his property, when, taking advantage of the act of 1844, he gave a replevy bond for the forthcoming of the property levied upon. To this delivery bond Joseph B. Roulhac was surety. The defendant Robinson having failed to deliver the property to the Sheriff, according to the condition of the bond a new execution was issued therefor, according to the statute, against both Robinson and his surety Roulhac. Under this second execution a levy was made upon the property of Roulhac as well as that of Robinson, and the same was advertised to be sold on the first Monday of April in the same year; whereupon Robinson and Roulhac bring their bill for an injunction to restrain the execution of this process. This application was refused by the Judge below, and upon this determination and refusal the

case comes up by way of appeal to this Court. The questions here presented for our consideration are, first, whether a sheriff's sale can be legally made upon any other than the days designated in the statute of 1844 regulating sheriff's sale, and, secondly, if so, whether the defendants stood in a condition to avail themselves of a second replevy after the original defendant in execution had once availed himself of the delay which is provided for in the statute, upon giving bond as therein directed. Our statute of 1844, regulating sheriff's sales, provides that no judicial sales shall take place except upon the first Monday of December, January, February or March, provided the defendant in execution tenders to the Sheriff the bond therein prescribed, conditioned for the forthcoming of the property levied upon. Since the passage of this act, it has been the practice and general understanding of the profession that sheriff's sales could only take place on the days therein specified. While the language of the statute is peremptory that sales shall only be made on these days, it provides, as a condition precedent for obtaining the benefit of its provisions, that delivery bond shall be given to secure the plaintiff in execution, and these bonds have been held valid whatever fate might attend the property levied upon, for the reason that if the property dies or disappears the plaintiff in execution is prejudiced, as he might have had the benefit of a sale at once but for the interposition of the delivery bond.—See Alabama Reports.

The plainest and most ordinary rule in construing statutes is to suppose that the legislative power meant something by their enactment, and, upon the principle *magis valeat quam pereat*, give effect to such intention if it can be done. Now, in the matter of sheriff's sales, the Legislature have fixed four days in the year only upon which


these sales may be made, evidently to relieve the people from the rigor of the then subsisting law, so that, at the close of the year they might have opportunity of realizing their means to meet their engagements and liabilities. To sell the real estate of the defendant in execution would be as great an injury to him at an unreasonable period as the sale of his personal effects, and the main object of the law granting time and indulgence must have been the rescue of the debtor from the hard grasp of his creditors in all cases. With the reason or policy of this enactment we nothing to do. We find it on the statute book, and it is our duty to enforce it. To give it effect, we must suppose that the proviso requiring forthcoming bonds from defendants as a condition of securing the advantages of the statute was intended only to apply to personal property, which is perishable in its nature and might be subject to removal and delivery. Real estate is imperishable and immovable, is bound by the judgment and could neither be the subject of removal nor delivery, within the meaning and intent of the statute.

From this view of the statute, it follows, that while forthcoming bonds are necessary to obtain its advantages in case of a levy upon personal property, such bonds are not necessary in case of a levy upon real estate, to which the provision is inapplicable. By this construction the legislative intention will, we think, be carried out in whole and in part, and that relief afforded all execution creditors which it was intended to supply.

The act of 1855, amending the then existing law in relation to executions, provides expressly that there shall be no second replevy granted after the forfeiture of the first replevy bond. Roulhac, then, the security in the first replevy bond, stands in no better condition than his principal Robinson, the original defendant in execution, who

had, by his assistance, exhausted the relief afforded him by the statute. If Roulhac, under such circumstances, could be permitted to have a new replevy of his property, then his sureties upon bond might claim a similar advantage, and so on *ad infinitum*, from one set of sureties to another until no judicial sale could ever be had.

The resolution of these two questions is perhaps sufficient to dispose of this case, but there is another and different question touching the jurisdiction of the Court of Chancery involved, upon which this Court owes it to itself to express an opinion. This is a bill for injunction, alleging nothing material in behalf of the complainants beyond the fact that judgment and execution had been obtained against them at law, execution issued and levied and a sale about to be made in an irregular manner, upon a day not authorized by the statute of 1844. Upon considering the application for an injunction, the Circuit Court Judge must have taken these allegations to be true as upon demurrer. Suppose it were so, the question will arise, had the complainants adequate remedy at law? It is of great importance that the jurisdiction of the Courts of law and equity should be kept separate and distinct and the chancery power never invoked while remedy can be had at law. This is indispensable to avoid circuity of action and the delay of justice incident thereto. We see no reason why the complainant in this case might not have obtained from the Circuit Judge who rendered the judgment either at chambers or in term time, a complete and perfect remedy for all the injury anticipated by his bill without proceeding in the Court of Chancery. This Court can only proceed in the exercise of its peculiar jurisdiction and can claim no power to restrain or control the process of a Court of law, unless its powers are brought into requisition by some latent equity not cognizable in a Court of



law. The Courts of law have full power to revoke, correct, restrain or quash their own process in the course of their own ordinary jurisdiction. But, in this State, the very same act of 1844, under which this complaint is made, empowers the Circuit Judge to afford relief in and ample manner against all abuse of its the process. The sixth section is as follows: "That the Court before which an execution is returnable, or the Judge in vacation, may, on application and notice to the adverse party, for good cause, upon such terms as the Court may impose, direct a stay of the same and the suspension of proceedings thereon until the first term of the Court thereafter, or until a decision can be had on the same." This statute was brought under the consideration of the Court in the case of *Mitchel vs. Duncan*, reported in the 7th vol. *Florida Reports*, page 13, for another purpose, but the argument there made shows the construction which the Court gives the statute. The Court there say: "The remedy, therefore, afforded by this statute, though analogous to that obtained by injunction, is more ample and convenient by reason of disposing of the question of equity jurisdiction and directing execution on the bond without a formal suit thereupon." The power, therefore, of a Court of law to afford relief in cases of this sort, though not precisely in issue and decided, is clearly indicated by the opinion delivered in the case referred to; and, in addition to this, there is a manifest impropriety in the Court of Chancery interfering with the process of a Court of Law, which is the peculiar property of that Court unless its jurisdiction is expressly claimed by equities alleged outside of and apart from the process.

The judgment of the Circuit Court must therefore be affirmed with costs.

*Note.*—DUPONT, J., concurs in the judgment pronounced

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Miller & Criglar vs. Kingsbury.—Statement of Case.

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and also in the rulings upon the construction of the statutes regulating Sheriff's sales, but is not committed to the views expressed in the opinion with regard either to the extent of the powers of the Court of law over the action of its officers or with reference to the jurisdiction of the Court of Chancery.

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MILLER & CRIGLAR, APPELLANTS, VS. JOHN KINGSBURY,  
APPELLEE.

1. It is a well settled rule of practice, both in the English and American Courts, that on demurrer the Court will consider the whole record and give judgment for the party to who on the whole appears to be entitled to it.
2. Where there is one good count in the declaration and the record contains no bill of exceptions incorporating the evidence adduced at the trial, the legal presumption is that it was sufficient to sustain the judgment upon that count.
3. The appellate Court will intend that everything necessary to sustain the verdict was proved unless the omission was taken advantage of by exception in the Court below.

This case was decided at Mariana.

Appeal from Santa Rosa county.

This was an action of assumpsit. Besides the usual money counts, the declaration contained a special count, as follows: "For that whereas the said defendant Miller, on the 16th day of May, 1855, made and delivered to the said John Kingsbury his certain promissory note in writing in the following words and figures, to-wit: On the sixteenth day of December next, I promise to pay to John Kingsbury, or order, seven hundred and fifty-four dollars

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and thirty-one cents in lumber, at the mill on East Bay, said lumber to be valued by Messrs. A. McVoy & W. J. Keyser, and to be sawed according to bill furnished by said Kingsbury, and to be merchantable, with eight per cent, interest until paid.

(Signed)

WILLIAM MILLER.

Milton, May 16th, 1855.

“Which promissory note was then and there endorsed by the said W. L. Criglar, whereby he became a party to the aforesaid promissory note and equally bound with said William Miller to pay the said sum of money in lumber to the said plaintiff; and whereas the said plaintiff was, on the 16th day of December, 1855, and still has been ready to receive the said lumber, at the Mill on East Bay, according to the bill furnished by him to the said William Miller; and whereas the said William Miller and the said W. L. Criglar did not either of them deliver to the said plaintiff at the mill on East Bay, or anywhere else, any of the said lumber, and still refuses to deliver the same; and whereas the said defendants, in consideration of the premises then and there, to-wit: at Santa Rosa county aforesaid, did promise to pay the aforesaid sum of seven hundred and fifty-four dollars and thirty-one cents to the said plaintiffs in lumber, according to the tenor and effect of the aforesaid promissory note,” &c.

Seven pleas were filed by the defendants, the last of which alleged, “that the said William Criglar, for plea to the first count in the said plaintiff’s declaration, says that the said plaintiff did not give him notice of the non-payment of the said promissory note by the said William Miller upon the presentation of the same to him for payment, and this he is ready to verify,” &c.

Plaintiff replied to the first six pleas and demurred to the last, assigning as ground of demurrer that “the said

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promissory note declared on is not negotiable, and that the said William Criglar was an original party maker thereof, and primarily liable to be sued thereon, and therefore not entitled to the notice of the non-payment thereof by the said William Miller."

The demurrer being sustained, the defendants withdrew all the other pleas and a judgment by *nil dicit* was taken by the plaintiff, from which defendants appealed.

*W. E. Anderson* for appellants.

*Yonge & McClellan* for appellee.

DUPONT, J., delivered the opinion of the Court.

This was an action of assumpsit brought by the appellee against the appellants upon a written agreement, which contained a promise to pay a certain sum of money *in lumber*, to be delivered at a certain place and to be valued by certain persons therein named, according to a bill to be furnished by the payee. The declaration contained a special count on the agreement, and very improperly designated it a "promissory note." The usual money counts were also embraced in the declaration. Seven pleas were interposed by the defendants below; all of which were replied to except the last, to which there was a demurrer. The demurrer to this plea was sustained, and thereupon the defendants voluntarily withdrew all of the other pleas and suffered a judgment to be taken by *nil dicit*. To reverse this judgment the cause is brought to this Court.

The only exception contained in the general assignment of errors that we deem necessary to be considered is in the following words. "That the declaration being defective as well as the plea, the Court should have given judgment for the defendants." It is a well settled rule of practice, both in the English and American Courts, that, on demurrer, the

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Court will consider the whole record and give judgment for the party who on the whole appears to be entitled to it. Thus, on demurrer to the replication, if the Court thinks the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the defendant, but the plaintiff, provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant.—Ste. on Plea., 162. Thus, too, if there be a demurrer to the plea, it will reach back to the declaration, and, if that be bad, the judgment will be for the defendant. This doctrine was enunciated and acted upon by this Court in the well considered case of Parkhill's adm'rs vs. the Union Bank of Florida, (1 Flo. Reps., 110.) In the opinion delivered in that case, the Court say: "If the pleading be bad, judgment should be had against him who made the first default; and it matters not whether the issue be of law or fact, whether the cause has proceeded to issue or not, the Court is always bound to examine the whole record and adjudge for the plaintiff or defendant according to the legal right as it on the whole appears." Looking into this record, we perceive that the *special count* of the declaration is manifestly faulty and wholly insufficient to sustain the judgment of the Court below. It only remains, then, to consider whether there is enough in the record, independent of the special count, to save the judgment. It will be noted in this connection, that, in addition to the count upon the special agreement, the declaration contains all of the usual money counts. These latter counts seem to be unobjectionable, and as the record contains no bill of exceptions incorporating the evidence adduced at the trial, the legal presumption is that it was sufficient to sustain the judgment upon these counts.

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“The Appellate Court will intend that everything necessary to sustain the verdict was proved unless the omission was taken advantage of by exception in the Court below.” 11 Barb. S. C. Reps., 205.

The same doctrine has been repeatedly enunciated by this Court and is strictly applicable to the case now under consideration.—Dorman vs. executors of Richard, 1 Fla. Reps., 281.

Our statute would also seem to support this view of the law. It says, that “no judgment after verdict of a jury or an award of arbitrators shall be stayed or reversed for any defect or fault in the original writ, or for a variance between the writ and declaration, or for any misleading, insufficient pleading or misjoining of the issue, or for any faulty count in a declaration where the same declaration contains one count or more which is or are good, or for any informality in entering up the judgment by the Clerk,” &c., &c.—Thomp. Dig., 351.

Notwithstanding the very great defects in the special count, we are nevertheless constrained, by the position which the case is made to assume before us, to sustain the judgment under the common counts.

The judgment will therefore be affirmed with costs.

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WILLIAM CLARK, APPELLANT, VS. THOMAS N. GAUTIER, IN  
BEHALF OF DICK, A PERSON OF COLOR, APPELLEE.

The writ of *habeas corpus* is not the proper method of trying the right of a negro to freedom.

This case was decided at Marianna.  
Appeal from Jackson Circuit Court.

On the petition of Thomas N. Gautier in behalf of Dick, alleging him to be free and unlawfully detained in slavery and custody, a writ of *habeas corpus* was issued against William Clark, to show cause why he detained the said Dick.

It appears by the record that Dick is a mulatto man, and that he has been held in servitude from early infancy. The witnesses for the petitioner deposed that his mother was a white woman, and that he was sold for a small price until he was twenty-one years old. This, however, was controverted by witnesses examined by defendant.

The Court below decided that Dick was entitled to his freedom, and ordered that he be set at liberty, from which the defendant appealed.

*Milton & Milton* and *Yonge & McClellan* for appellant.

*A. H. Bush* for appellee.

BALTZELL, C. J., delivered the opinion of the court.

We have given this case the anxious deliberation and reflection due alike to its importance and the gravity of the interest involved, regretting that the shortness of the time allowed will not admit a more careful development of the legal principles and questions connected with its proper solution.

The controversy arises from an application by Thomas N. Gautier, stating that Dick is a free man and detained in slavery and custody, without lawful authority, by Wm. Clark. This allegation is denied, and it is insisted that he is a slave.

Whilst listening with pleasure to the impassioned appeals of the counsel of petitioner, depicting in lively colors the claims and rights of his client, and, on the other side,

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the no less forcible and animated reply of his opponent, enforcing with great power the rights of the defendant claiming to be the owner, we have not been unmindful of the fact that to us is not assigned the high position of weighing considerations of abstract right and propriety. These pertain to the sovereignty lodged in another department of government—to the legislature. Our office is the more humble, the deeply responsible one of ascertaining, with whatever ability we may possess, the law as it is, and of determining and declaring the rights of the parties before us, without yielding either to the suggestions of policy or to the still more imposing ones of humanity. The relation which the African race bears and has borne to the white man from the earliest period of history is set forth in language clear and perspicuous and demonstrable beyond doubt in the able opinion delivered by the Judges of the Supreme Court of the United States in the celebrated case of *Dred Scott vs. Sanford*, 19 Howard, 393. It would be a vain effort to try to add to what is there so well expressed. It is sufficient to refer to these opinions to show that whatever rights the negro or his descendants, if free, may have, are accorded to him, not by right, but permission and grant of the State in which he is. People from other parts of the globe, through the comity of nations, have a recognized position by the common voice of the civilized world which Africans have not. Condemned to servitude, subjected indeed to the dominion of other people from time immemorial, they have been, as they yet continue to be, chattels, subjects of trade and commerce. The mark of color at once fixes upon them the *status* of inferiority and degradation, and by whatever fact, in legal contemplation they are regarded as slaves, so that, in case of contest, the burthen of proof is thrown upon them of establishing their state of freedom. Nor is the rule estab-

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lished that the rights of free negroes depend entirely upon municipal regulations. In several of the States they have been permitted to bring actions of trespass to test their rights to freedom—as in Kentucky, Tennessee and North Carolina; and in our own State one case exists in which a like decision was had, though the question as to the remedy seems to have been overlooked or not regarded.—<sup>1</sup> Haywood, 422; <sup>2</sup> Mon., 467; 6 Yerger; Sibley vs. Maria, <sup>2</sup> Florida, 560.

In other States, there would seem to be provisions particularly applicable to the subject, though we speak cautiously on this point, not having access to a full library. The writ of *habeas corpus* has been allowed them without dissent, so far as we can discover, not to try the right in case of real contest, but in cases of clear and unquestionable claim. It has been universally refused and deemed inadequate in cases where there has been such contest and where the effect of a decision by the court would be to deprive the party in possession asserting a claim of the right of trial by jury. There has not been an adjudication by the Courts of a Southern State cited to us, nor have we been able to find such, wherein a question of real contest as to the right of freedom on the part of the person claimed as a slave the remedy of *habeas corpus* has been considered the appropriate one to determine this question. At the North, we well know that the right of a slave to jury trial has been earnestly insisted upon in all cases, even those presenting the clearest and most irrefragible evidence as to him. Here the effect of an allowance of the writ to the extent claimed would be a denial, by Southern law and adjudications of Southern Courts, to the white man of the very privilege claimed for the negro by Northern philanthropy.

The controversy before us, as already indicated, is upon

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the claim of the negro man Dick to his freedom. Testimony was taken, both orally and by depositions, to establish and controvert it. It is uncontroverted that Dick is a man of color, a mulatto; that he has been held in servitude from early infancy, a period of near twenty-five years, this possession being uninterrupted; that he was purchased for a price, though a small one. The witnesses on one side depose that his mother was a white woman; that he was sold only until he was twenty-one years, &c., whilst this is controverted by others. The Court below determined the case in favor of petitioner, being of opinion that the evidence preponderated in his favor. Whether, under the circumstances of the case, this may be rightfully done through the remedy adopted, the writ of *habeas corpus*, is the question for our adjudication. There being, fortunately for us, decisions made by Courts holding the same relation with ourselves to this delicate subject, assented to and having the sanction and approbation of the entire Southern judicial mind and people, has relieved us of the necessity of investigation to ascertain the entire verity of the conclusions to which they have arrived.

The case of the State vs. Frazier, jailor of Richmond county, decided in 1831, in the State of Georgia, was an application of this kind. The Court say: "Can it, under this writ, enquire into and adjudge the right to freedom claimed by the petitioner in opposition to the claim of property in her as a slave by Philpot? These are the questions distinctly presented to the Court for their determination, and, though grave and important, they seem simple enough to be answered without much hesitation. The writ of *habeas corpus* is intended for the protection of the personal liberty of freemen, and never was designed or used to try any right of property. The Court of King's Bench, in the case of Penelope Smith, reported in 2

Strange, 982, refused to enquire into and determine the right of guardianship, declaring that the father, who had sued out the writ and sought to have possession of his son, had other remedy, &c. Here the court is called upon, not to determine the right of guardianship, but the right to the perpetual and involuntary service of Winney, or whether she be or be not the slave of Philpot. The guardian of Winney has other remedy." The Court said they could not trench on the constitutional rights of another to render to her summarily what may be and perhaps is justice. She was discharged.—Dudley's Reps., 45.

In South Carolina, the writ *de homine replegiando* was resorted to, which the Court refused to entertain, alleging its disuse in England as having been superceded by the writ of *habeas corpus*, a much more efficient remedy. In this case, they declared that the true remedy of the petitioners claiming to be free persons of color was the statutory provisions made for their case, (Huger vs. Barnwell, 5 Richardson, 277,) and not through permission of the common law.

The case of De Lacy vs. Antine, decided by the Court of Appeals of Virginia, is still more in point. "In considering this case, said Tucker, J., I concede, as ever, that, under our law, the *habeas corpus* is not the proper method of trying the right to freedom. The act of 1795 has prescribed the remedy which the negro must pursue. Anterior to this act the *habeas corpus* and *homine replegiando* were resorted to by slaves asserting a right to freedom, but, as these remedies proved vexatious and unsafe, a new proceeding was presented by the act already cited, the *homine replegiando* was repealed and the *habeas corpus* was considered as no longer appropriate. It is observable, however, that there is no provision in the act which denies the *habeas corpus* to a person illegally confined in custody,

although he be a free person of color, nor can I believe it was ever designed to exclude any free man whatever from the benefit of this great salutary writ. When, indeed, on the face of the petition it appears that the case presents a litigated question as to the right of a negro to his freedom, the writ should be refused as inappropriate to the case. When this does not so appear, but carries out in the return and is sustained by the proofs, the party should be remanded or sent to the Justice of the Peace to make his complaint according to law. To suppose that a free negro, in possession of regular free papers, may be falsely imprisoned, at the pleasure of any individual, without redress, is indeed to attribute a gross and lamentable omission to the law. A free negro, as well as a free white man, must be entitled to the benefit of the *habeas corpus* act both according to its language, which is broad and general, and, still more, according to its spirit, which is yet more liberal and beneficial. If it were otherwise, that wretched class would be altogether without protection from the grossest outrages, and their personal liberty would be an unsubstantial shadow. In such cases, therefore, the Court must exercise a sound discretion, discharging the party when there seems to be no real litigation as to the right to freedom and remitting him to his suit in *forma pauperis* where there is." Brooke, Judge, dissenting, says, it is admitted that as slaves they are not entitled to the writ of *habeas corpus*, and that the question of property cannot be tried on the writ. In a forum having jurisdiction of the question of slavery under our statutes, the color of the party, showing that he is of the African race, is *prima facie* evidence that he is a slave and puts the onus on him to prove that he is free. This is one of the hardships of his condition. On the contrary, the foundation of the right to the writ of *habeas corpus* is that he

is a free man, and the word person in the act of *habeas corpus* implies that he is free and not one whose title to freedom can be questioned anywhere. The provision that he is to make affidavit and give bond before the writ can be obtained, implies the same. The provision in the English Magna Charter, (4 Co., 45,) that no free man shall be taken or imprisoned, &c., is the foundation of the writ of *habeas corpus*.—7 Leigh's Reps., 443, 451.

In Thornton vs. Dimas, decided by the High Court of Errors and Appeals of Mississippi, the same view was taken of this subject. The C. J. says: "In all civil proceedings, negroes are regarded by our laws as property, and the owner or claimant cannot be deprived of his right or claims except by a verdict of the jury. The 48th section of the act in relation to slaves provides the mode by which a negro who claims to be free shall establish his freedom, and it is the only remedy which he can pursue. Negroes, although persons for some purposes, are generally regarded as property and excepted out of the general legislation in regard to persons unless specially included. The color is *prima facie* evidence of liability to servitude."—5 S. & M., 617-18.

Such are the views taken by intelligent Southern Courts on this interesting question, and though there may be a slight and unimportant difference as to the precise ground upon which their conclusions are founded, very clearly there is a concurrence of opinion that where there is a contest and fair subject of controversy as to the facts of freedom, the writ of *habeas corpus* is not the appropriate remedy and is unsuitable to such purpose. That there is nothing in our laws to relieve the case from the operation of the ruling, as here announced, will readily appear from a simple recitation of the different statutes of our Legisla-

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ture passed in reference to this class of persons. It is not permitted them to keep or use fire arms, or buy them or powder, lead or shot, nor even spirituous liquors, without the consent of guardian—nor to intermarry with white male persons. Their immigration to this State is prohibited, with directions to Justices of the Peace to transport them beyond the State. They are not to use abusive and provoking language to or lift their hands in opposition to any person not a negro or mulatto. They are not allowed to be witnesses, except as to slaves, free negroes or mulattoes. In case of an execution against them, without payment in five days, they are liable to be sold as a slave. By a law passed in 1848, all free negroes and mulattoes above the age of 12 years are required to have a guardian, "who shall have power to sue for and recover all such sums of money as are or hereafter may be owing to such free negro or mulatto, and shall have the same control over such free negroes or mulattoes as is possessed by guardians in other cases." Page 27.

These provisions of our State legislation but confirm and justify the views contained in the decisions quoted and conclusions to which we have arrived, that the present being a case of actual and real controversy as to the right of freedom on the part of the petitioner, he is not entitled to be discharged by writ of *habeas corpus*, and that the Circuit Court erred in granting his discharge. Nor does the fact that the application was made through another, a citizen of the State, in our opinion, change this view of the subject. The appointment of guardian neither gives nor creates greater rights than without it; certainly can have no effect of depriving the person claiming as owner of the right of trial by jury, secured by the highest of all sanctions. The appointment is but the means of attaining known or fixed rights, not of conferring new and impor-

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tant ones. The petition does not purport even to be by a guardian. Nor have we considered it appropriate, on the present occasion, to express our opinion as to the proper remedy to be adopted by the petitioner in further pursuance of his rights. The action of appellate Courts, for the most part, with few exceptions, is confined to questions raised by the records. The case presented by this record is as to the contested question of freedom in favor of a man of color based upon an application for a writ of *habeas corpus*. We have determined this to be erroneous, and it is sufficient to say, that, in our opinion, our duty is fully discharged. Other questions, that will arise hereafter, will be discussed and considered when the case may be presented in a legal and appropriate shape.

The judgment of the Circuit Court will be reversed and set aside and the cause remanded, with instructions to that court to dismiss the writ and petition with costs.

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STEPHEN RICHARDS, APPELLANT, VS. JAMES NALL, APPELLEE.

On motion to docket and dismiss appeal.

*Yonge & McClellan* for the motion.

*A. H. Bush contra.*

DUPONT. J.

The counsel for the appellee produced and exhibited to the Court a certificate of the Clerk of the Circuit Court

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for Calhoun county, certifying that the appellee had obtained a judgment in that Court on the 23d day of November, 1858, against the appellant for the sum of one thousand and fifty-three dollars and seventy-four cents, and that the appellant had taken an appeal from the said judgment by filing the necessary bond on the 30th day of the same month. Upon this state of facts, the counsel for the appellee moved to docket and dismiss the said case, and claimed that damages should be awarded to him against the defendants below as for a frivolous appeal.

The record not having been filed and the appellant showing no cause for his default, it is therefore ordered and adjudged that the said cause be docketed and dismissed, and that the appellee be allowed against the said appellant ten per cent. upon the principal of the judgment recovered in the Court below for his damages sustained by reason of the taking of the said appeal, the same to be assessed by the Clerk of the Circuit Court and included in the execution to be issued therefrom.

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JOHN MARTIN, APPELLANT VS. THE PENSACOLA & GEORGIA  
RAILROAD COMPANY, APPELLEE.

1. Where a party is sued to recover assessments upon his shares in an incorporated railroad company, it is inadmissible to allow oral testimony to be given at the trial as to the *inducements* and *circumstances* which led to the subscription and the *understanding* of the subscribers when they subscribed, unless such testimony goes to establish *fraud* or *mistake*.
2. Where, in such a suit, the defence is that the corporation has accepted from the Legislature an amendment, which radically alters the original charter, to constitute this a good defense the defendant must show affirma-

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tively that he *dissented* from such alteration in a reasonable time, before any debts have been contracted or rights have accrued to third parties under such alteration; and it is not incumbent upon the corporation to show his *assent* in order to be able to maintain the action.

2. Where, in the body of the subscription, there is a stipulation for a particular enterprise, as for the building of the road to a particular place, or for its location upon a specified route, such stipulation forms a *condition precedent*, and unless strictly complied with by the corporation, the party subscribing will be absolved from his obligation to pay.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

This was an action of assumpsit, instituted by the appellee against the appellant to recover the amount of subscription for stock in the said Company by Martin, the appellant.

Defendant pleaded non-assumpsit, and, by agreement of parties, all substantial defences were to be admitted under that plea.

The record contains a bill of exceptions embracing the testimony offered at the trial and the rulings of the Court thereon, and the instructions given and refused by the Court below to the jury, as follows, viz :

The counsel for the plaintiff, to maintain and prove the issue on his part, offered in evidence the first subscription list of the Pensacola and Georgia Railroad, on which appeared the name of the defendant as a subscriber. It was admitted that the calls had been regularly made, and here the plaintiff closed.

The defendant's counsel, to maintain the issue on his part, offered Gen. R. A. Shine as a witness, who proved that he himself had subscribed for shares in the same railroad to the amount of one hundred thousand dollars. The defendant offered to prove by this witness the inducements and circumstances which led to the subscription of the railroad at the time of the first subscription, which was

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objected to and the objection sustained, to which ruling of the Court herein the defendant by his counsel excepted. Witness was then asked what was the understanding of the subscribers when they subscribed, which was objected to and the objection sustained by the Courts, to which counsel for defendant excepted. Witness was then asked to what point the road was being constructed, which was ruled to be a proper question, and witness proved that it was in course of construction to Alligator, not on the Georgia line; that he is a Director in said company, and that there has been no survey of any road to the Georgia line and no action taken by the Company having for its object the running of the road from Alligator, or any other point, to the line of Georgia, and that when he and Martin first subscribed, it was to a road to be constructed to the Georgia line; that he, witness, and many other large subscribers were released from their original subscriptions for stock after the acceptance of the provisions of the Internal Improvement act by the Company, which acceptance was proved.

The defendant then offered in evidence the minutes of the company and the acceptance of the act of 1855, together with the charter of said Company and the act amendatory thereof, which minutes, so offered without objection, are as follows:

“TALLAHASSEE, Nov. 28th, 1853.

“*Resolved*, That correspondence be forthwith opened with the corporation and citizens of Savannah and Albany Railroad Company to inform them that this Board is fully organized and is prepared to discuss all matters of mutual interest to the two Companies, as well in regard to the proper point at which their contemplated branch road should enter Florida, in view of extending it to Pensacola under the charter granted in this State, as also to ascer-

tain what provision they propose to make, either by subscription of stock in this Company or in any other way, for the completion of this road from the point of junction to its Western terminus over and above the sum of \$800,000 pledged to be subscribed in Florida, or above any larger sum that may be so subscribed, it being apparent that the work will require an addition of two million of dollars,

“2d. That immediate correspondence be opened both with the Atlantic and Gulf Central Railroad Company and with the Florida Railroad Company, in order to secure harmony of action in an application to Congress for a grant of public lands contiguous to the respective roads, and in order to bring the subject before that body early in the session, and by this correspondence this Board desires to express the deep interest it feels to harmonize with these Companies in regard to their Eastern or Atlantic terminus in our own State and in the location of their lines of road extending Westward and Southward from such terminus, in view to a junction with this road, in the most favorable manner for the interest of the respective Companies and for the purpose of ultimately binding all sections of the State by an extensive railroad system.

“4th. *Resolved*, That the Apalachicola Land Company being large landed proprietors in the neighborhood of our contemplated road, should be invited to subscribe liberally to its stock, or urged to aid in its construction by a grant of land, in view of the greatly enhanced value it would confer on their lands generally.

“And it is further ordered, that the large subscriptions made on the 8th of October last, in the subscription book at Tallahassee, by Richard Hayward, R. A. Shine, Benj. F. Whitner, John C. McGehee, Edward Houstoun, D. C. Wilson and Edward Bradford, for themselves and their

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associates, are exempted from the payment of the instalments now called in, as stipulated and provided for at the meeting of the stockholders, and are therefore not liable to be forfeited.

“TALLAHASSEE, Jan’y 11th, 1854.

“A letter was read from A. S. Baldwin, President of the Atlantic and Gulf Central Railroad Company, containing resolutions adopted by that Company on the subject of a connection with this and a large exposition or argument against our proposed junction with a road from Savannah and in favor of our asking a repeal of our charter, a transfer of our subscriptions to that of the Central road and of making the St. Johns i. e. Jacksonville the Atlantic terminus. After due consideration, the Board was unanimously of opinion that these resolutions and arguments present no sufficient reason or inducement for changing our present plan, while we still desire to cultivate harmony and good understanding with the A. & G. C. and Florida Railroad Companies and believe there will be no serious difficulty, if there is a mutual desire among the several parties.

“TALLAHASSEE, 10th Feb., 1855.

“It was agreed to postpone a full organization of the Board by the election of permanent officers until the 11th of April next.

“The Secretary was instructed to notify the Trustees of the Internal Improvement Fund of the full acceptance by this Company of the provisions of the act to provide for and encourage a libel system of Internal Improvements in this State, approved 6th January, 1855, and to specify the route lying between Pensacola or the waters of Pensacola Bay and the point of intersection with the Florida Railroad on the most direct practicable line to Jacksonville, with a view to an extension afterwards to the Georgia line.

as that over which this Company proposes to construct its road, which notice is in conformity with the two first resolutions adopted at the recent stockholders' meeting.

"TALLAHASSEE, Oct. 18th, 1855.

"The President stated that the object for calling a meeting of the Board at this time was to consider and act on the report of the Engineers who have been engaged in making surveys of various routes for a railroad from Tallahassee to the town of Alligator, in the county of Columbia. It was expected that the reports, estimates, &c., would be ready to be submitted to the Board.

"The Georgia railroad Company, if they be compelled to seek a terminus on the Georgia line East of the terminus now contemplated in Hamilton county, may use any part of the Atlantic and Gulf Central Railroad as part of the road of the Pensacola and Georgia Railroad Company to the Georgia line, and, in like manner, the Atlantic and Gulf Central Company may use any part of the road of the Pensacola and Georgia Railroad Company which may intervene between roads on the main line constructed by the Atlantic and Gulf Railroad Company. If when the Pensacola and Georgia Railroad Company shall have constructed their road to Alligator, the other Company shall not have constructed theirs to that point, the former Company shall be at liberty to construct Eastward to the Florida road, or to a junction with the road from Jacksonville West, and, in the latter event, the connection at the point of meeting shall be made on the same terms as provided for a connection at Alligator; and if any part of the work from Alligator Eastwardly shall have been performed, the Pensacola and Georgia R. R. Co. may adopt that work as a part of their road, they paying therefor the stock of their Company to the amount of the costs of the work; and the

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Atlantic G. C. R. R. Co., if the other Company do not construct their road to Alligator by the time the A. and Gulf Railroad Co., shall have constructed theirs to that point, to be at liberty to construct Westwardly until they connect with the road of the Pensacola and Georgia Railroad Co., and a connection at such point of meeting shall be established on the same terms as provided for a connection at or near Alligator.

“Fifth. Passengers, freights and cars of each Company shall pass over each road with the same facilities as if the whole road had been constructed by one Company; and passengers, freights and cars on the road to the Georgia line coming South to the main line from Jacksonville to Pensacola Bay, whether going East or West, after reaching said main line—or passengers, freight or cars passing from any point on the main line from Jacksonville to Pensacola Bay and going up the road to the Georgia line—shall pass with the same facilities as if they shall continue on the main line from Jacksonville to Pensacola Bay.

“The two Companies shall unite in asking the General Assembly to ratify and confirm the agreement which shall be made between them, by proper amendments to their respective charters, in such manner as to give effect to their agreement.

“After some discussion, the report and all the foregoing specifications, except the fifth (5th,) were adopted, and it was ordered that a copy of the report and specifications and the action of the Board thereon be communicated to the Florida Gulf and Atlantic Central Railroad Company by the President of this Company.

“The President stated, that he had heard unofficially that the Tallahassee Railroad Company had appointed a Committee to meet a similar Committee of this Board to confer together as to the terms and conditions on which a

juncture of the roads of the two companies can best be effected.

"OCT. 30, 1865.—A vote was then taken on the various modifications of this route and resulted in the adoption of line 2, which was from Tallahassee to or near Bailey's then near Capt. L. Bailey's and William Scruggs, in Jefferson county, and, crossing the Aucilla below Sandy Ford, passes through the Northern part of Patterson Hammock, and leaving Madison C. H. to the North, crosses the Suwannee river near Columbus, and thence to a point near Alligator, in Columbia county."

It was admitted, that at the time of the subscription made by Martin to the stock of the Pensacola and Georgia Railroad, whose name is on the first subscription list, that said subscription was made, together with others, with a view to a connection with Georgia and to control the majority of the stock of the Pensacola and Georgia Railroad and secure a connection.

Here defendant closed.

The plaintiff then called F. H. Flagg as a witness, who proved that the Pensacola and Georgia Railroad Company commenced work in the fall of 1855; that the road is graded to Suwannee; that he called on Martin for the payment of his subscription; that he refused and said that Gen'l Shine had persuaded him and promised him to take it off his hands as he did not want it.

The subscription of the 9th May, 1855, was offered in evidence without objection. Mr. Flagg was asked by plaintiff as to the acquisitions of the Company under the act of 1856. Objected to by defendant—objection sustained.

Cross-examined and asked whether defendant was present at the meeting of stockholders which accepted the Internal Improvement act? He stated that he did not know;

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that he never saw him; does not know that he ever assented to the charge in the route of the Pensacola and Georgia Railroad from the originally contemplated route to the line of Georgia. Gen'l Shine also proved the same thing.

Walker Gwynn, a witness for plaintiff, testified "that the Pensacola and Georgia Railroad will be entitled, under the act of Congress of 17th May, 1856, to 1,167,360 acres of land, and under the act of the Legislature of Florida of 6th January, 1855, to 139,210 acres of State land. I have located, examined and appraised, on the line between Tallahassee and Alligator, 363,607 84-100 acres, which I have appraised at an average of about \$1 79 per acre. Of this about 200,000 acres lie in Columbia county, between the Suwannee river and Alligator, my average appraisement of which is about \$2.80 per acre."

Here the testimony closed, and, after argument of counsel, the counsel for defendant moved the Court to charge the jury as follows:

That the charter of the Pensacola and Georgia Railroad Company, as it existed at the time of defendant's subscription, is as much a part of the contract as though the same had been embodied in the caption to the subscription paper, and that no material alteration could be made in said contract by the Pensacola and Georgia Railroad Company, or by the defendant, without the consent of both parties. Therefore, if the jury find that the road now in course of construction is a different road from that set forth and contemplated in the original charter, the defendant is not bound for the instalments called in, unless the assent to such change of route by the defendant has been proved; or if the jury find that the terminus of the present road is at a point not contemplated by the original charter, the defendant is not bound, unless his assent to

such change is proved; that the charter constituted part of the contract of subscription, and that an alteration in the route of the road or in its termination which would defeat the original object intended by the corporation would release the defendant, if made without his consent.

If the jury believe from the evidence that the original object and purposes of the defendant in subscribing for the route and terminus contemplated in the original charter were materially defeated by the adoption of the present route and terminus, then he was not further bound for his subscription, and they should find for the defendant.

Which instructions were refused, and, in lieu thereof, the Court gave the following :

The charter of the Pensacola and Georgia Railroad Co., as it existed at the time of the defendant's subscription, is a part of the contract, and no material alteration could be made in said contract by the Pensacola and Georgia Railroad Co., or the defendant, without the consent of both parties. If, therefore, the jury believe from the evidence that the road now being constructed is a different road from that set forth in the original charter, the defendant is not bound unless he assents; or, if the jury believe from the evidence that the terminus of the present road is at a point not contemplated by the original charter, the defendant is not bound, unless he assents to the change.

The counsel for plaintiff then asked the following instructions, which were given :

That the acceptance of the Internal Improvement act is consistent with the purposes of the Pensacola and Georgia Railroad Company and its auxiliary only. That the acceptance by the Pensacola and Georgia Railroad of the Internal Improvement act was an act of the stockholders of said Company, and, if the charter of the Company is violated by said acceptance, the charter is not thereby altered, but

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the act of acceptance is void; that the Pensacola and Georgia Railroad Company, after the subscriptions were made, could determine its Eastern Terminus at any place on the Georgia line and from time to time change its policy to its Eastern terminus; that the Company was competent to stipulate for a terminus East of the Alapaha; that the defendant must show that he made timely objection to the acceptance of the Internal Improvement act, and the presumption is, in the absence of proof to the contrary, that he assented to the action of the stockholders, who unanimously accepted the act; and especially is this presumption proper where the Company has contracted debt to large amounts before any objection is made.

To which instructions so given, and to the rulings of the Court herein, the defendant by his counsel excepted.

Defendant asked the following charge:

If the jury shall believe from the evidence that the Legislation or the corporation have undertaken to embark this corporator in a speculation to which he never consented, or in any enterprise to which he never gave his consent, then he is absolved from his subscription and the majority cannot bind him.

Which instruction was refused. To all which refusals of the Court to admit or allow the evidence of the defendant and to the charges given for plaintiff, and refusal to give the charges asked for by defendant, and the rulings of the Court therein, defendant by his counsel did then and there except.

A verdict and judgment having been rendered for the plaintiff, defendant appealed.

*W. Call* and *D. P. Hogue* for appellant.

*J. T. Archer* and *R. B. Hilton* for appellee.

DUPONT, J., delivered the opinion of the Court.

This is a case of a chartered Railroad Company suing a recusant stockholder, to recover in an action of assumpsit the amount assessed upon his subscription to the capital stock of the Company. The stockholder pleaded simply “non-assumpsit,” with the privilege of giving in evidence under that plea all substantial matters of defence. The defence attempted to be set up at the trial was, that the Company, by the acceptance of the provisions of the Internal Improvement act of 1855, and by amendments obtained from the Legislature subsequent to the date of the subscription for stock, had materially altered and varied from the object and design contemplated and set forth in the original charter of incorporation; that he, the defendant, *did not assent* to this alteration, and that he was consequently discharged from his obligation to pay. A large amount of evidence, documentary and oral, was adduced with the purpose to sustain this point of the defence and the defendant also offered a witness to prove the inducements held out at the time to individuals to subscribe to the capital stock of the Company, but the Court refused to permit him to be questioned to that point.

The exceptions taken below embrace as well the rejection of this witness as the instructions to the jury given and refused. The assignment of errors in this Court corresponds with the exceptions. The case here was elaborately argued and ably contested by the counsel on either side. The discussion took a wide range and resulted in bringing to the notice of the Court a very large number of adjudicated cases, embracing the entire subject of the rights and duties of corporations. We are admonished by the discursiveness of the opinions delivered in those cases, and the many mere *dicta* to be found, of the great cau-

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tion which ought to be observed in giving an expression of opinion on points which do not legitimately arise out of the case before us.

In this age, when all the great improvements of the country are inaugurated under the influence of and owe their successful consummation to associated capital, it would be dangerous for the Court to anticipate questions which, whenever they shall legitimately arise, may tax to their fullest powers the most gigantic intellect. The law applicable to railroad charters in particular is just now in its formation or chrysalis state. They are of recent origin, and the rules to be applied to them are yet to be definitely settled. It would be well for the interest of the country and creditable to the judiciary as an institution that in the establishment of these rules, the commendable caution of those great Judges, under whose plastic hands the common law was brought into being, should be closely imitated. Under these impressions and influenced by these considerations, we desire to enter upon the examination of the law which is to govern in this case.

The first question that addresses itself to our consideration grows out of the refusal of the Court to permit a witness who had been offered to testify as to the "inducements and circumstances which led to the subscriptions to the railroad at the time of the first subscription," and also as to "the understanding of the subscribers when they subscribed." We do not think that this exception is well taken. It is an elementary principle of the law of evidence that oral testimony shall not be admitted to vary the terms of a written contract, and, upon this principle, it has been ruled that such evidence is inadmissible to vary the terms of a subscription to the stock of a railway, unless it tend to show fraud or mistake.—*Vide* Redfield's

Law of Railways, 70, citing 16 B. Monroe, 5; 20 Vermont Reps., 509; 34 Maine Reps., 369.

There was no pretence, even in argument, that there had been any fraudulent misrepresentations made to the defendant to induce him to become a subscriber to the stock of this Company, or that he had made his subscription under a mistake as to the terms of the charter of incorporation. Indeed, the point was not greatly insisted upon.

Of the other exceptions, all of which are grounded upon the instructions to the jury, either granted or refused, we will consider first the fifth instruction given, which is in the following words, viz :

“That the defendant must show that he made timely objection to the acceptance of the Internal Improvement act, and the presumption is, in the absence of proof to the contrary, that he assented to the action of the stockholders who unanimously accepted the act, and especially is the presumption proper where the Company has contracted debts to large amounts before any objection is made.”

The evidence in the record, of which the instruction is predicated, is at resoluion, passed at a meeting of *stockholders*, under date of the 10th of February, A. D. 1855. instructing the Secretary of the Company to notify the Trustees of the Internal Improvement Fund of “the full acceptance by the Company of the provisions of the act to provide for and encourage a liberal system of Internal Improvements in this State, approved 6th of January, 1855.” There was no evidence to show whether or not the defendant was present at that meeting, nor was it shown or attempted to be shown, that he ever objected to the act of acceptance. The only objection he appears ever to have made was when he was called on by Mr. Flagg, the

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Secretary of the Company, to pay the assessment on his shares of stock. He then objected to pay, but his objection was based, not on any alteration of the charter by the acceptance aforesaid or otherwise, but expressly upon the alleged ground "*that Gen. Shine had persuaded him and promised to take it off his hands, as he did not want it.*"

This instruction raises the question, how far an individual shareholder in an incorporated company is *bound* by the action of a Board of *stockholders* duly convened and organized. It is too clear to require any argument or authority to support it, that so long as the action of the Board is within the scope of its legitimate powers and limited to the promotion of the particular enterprise contemplated in the original charter of incorporation, so long do their acts, regularly passed, bind the individual shareholder, and he has no right to claim any immunity, nor can he relieve himself from his duty and obligation as a shareholder even though he should *dissent* in the most formal manner. It is only when the action of the Board is such as proposes to vary from, add to or radically alter the character of the original enterprise, and thereby impose new duties and obligations, that the question can ever arise. For the purpose of this argument, it will be assumed that the act of the Board of stockholders, in accepting the provisions of the Internal Improvement act, was of the latter character. Much error has crept into the books by the attempt to assimilate corporations to ordinary partnerships, and to apply to the one the rules of law peculiarly applicable to the other. Thus in *Angel & Ames on Corporations*, where reference is made to the liabilities of individual members of a partnership, it is said: "Such precisely is the law with regard to partnership associations, which are *incorporated*, and no point of law is more clearly and firmly settled than that, if a corpo-

ration procure an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders *as do not assent* to the alteration will be absolved from liability on their subscription to the capital stock."

This proposition, as enunciated, is not sufficiently qualified. If by the term "assent" it is designed to convey the idea that in such case each individual corporator must, in order to have his liability fixed, signifying his concurrence by *express assent*, the proposition is certainly incorrect, as it ignores the fact that, from the very nature and constitution of these respective associations, the individual in the one case speaks through his representative, the majority, in the other he speaks in *propria personae*. In the same authority it is said: "Corporations are subject to the emphatically republican principle (supposing the charter to be silent) that the whole are bound by the acts of the *majority* when those acts are conformable to the articles of the constitution."

It seems, says Mr. Kyd, "to be the first suggestion of reason that an act done by a simple majority of a collective body of men, which concerns the common interest, should be binding on the whole, and this is the principle of the rule adopted by the 'common law' of England with respect to aggregate corporations."—1 Kyd on Corporations, 422.

Upon these principles, it would seem that where the Company undertakes to depart from or add to the original object or design, as set forth in the articles of association or charter of incorporation, there is this manifest difference between a simple partnership and incorporated association; in the former, the assent of the individual member is not to be assumed—it is to be affirmately established by competent proof; in the latter, his assent will be pre-

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sumed unless he affirmatively proves his *dissent*. The ground of difference will be obvious to any reflecting mind. In the former case, the association being usually limited to a few members, they are generally competent to act in mass, whereas, the latter being composed of numerous individuals, residing in remote localities, they are constrained by the very necessity of the case, to speak through a conventional medium, viz: an organized majority. If this were not so, then would great inconvenience arise whenever it should become necessary for the interest of the association to vary from or add to the objects of the original enterprise. How would it ever be possible to obtain the *express assent* of each corporator? In many cases, their particular localities would be unknown, and, if originally known, may have been changed from place to place. If this were not so, then, in every case of the decease of a stockholder, the corporation could accept no alteration of its charter, however such alteration might promote its interest and the consequent interest of each individual corporator without reducing the original capital by the amount of stock standing in the name of the deceased; for, it will not be pretended that the executor or administrator would have the authority, in such case, to *assent*, however clear it is that he would have the right to *dissent* from the attempt to involve the estate in the new enterprise. Again, if this were not so, the rights and interests of the creditors would be at the mercy of the corporation; for, upon discovering that the prosecution of the original design of the charter had involved it in debt and that its further pursuit was likely to prove unprofitable and disastrous, in order to absolve its members from liability from any further calls, it would only be necessary to obtain from the Legislature an alteration of the charter, accept it by a meeting of stockholders composed of a bare *quorum* under the pro-

visions of the charter, and, as each individual might be sued upon his subscription, he would plead a want of *express assent*, and, unless it could be affirmatively proved that he was present at the meeting, he would be released and the creditors defrauded of their just rights. But how is the fact of his presence to be proved? Who is the witness that will prove that he was at the meeting and consented to the alteration?

The case before us fully illustrates our views; for, of all the witnesses interrogated, none could remember whether or not the defendant was present at the meeting which accepted the provisions of the Internal Improvement act, which, it is alleged, made a material alteration in the object contemplated in the original charter. And yet he may have been present, consenting to the act of acceptance, and for the lack of this *proof*, he is to be absolved from his liability on his subscription, and the creditors, contractors and laborers who had given credit in part upon the faith of his subscription, be deprived of their just rights, and this, too, without the slightest pretence that any injury or loss has or was likely to accrue to him from the alleged alteration.

It seems to us that the distinction rests upon the most rational grounds, and that the rule to be observed on this subject is, that whenever the corporation accepts from the Legislature a material alteration of their charter, if the same be done by the stockholders in general meeting, duly organized, it is binding upon each individual member, unless he shall expressly *dissent* therefrom before any debts are contracted or rights enure to third parties in carrying out the new design or enterprise. In this case, the defendant stands by from February, 1855, sees the work progressing under the provisions of the Internal Improvement act, silently acquiesces in the contraction of a large

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indebtedness, makes no whisper of disapprobation until he is called on to pay his assessment by the agent of the Company, when, for the first time, he objects to pay, not, however, on the ground of any alleged alteration of the charter, but for the avowed reason that "Gen. Shine had persuaded him and promised to take it (the stock) off his hands, as he did not want it."

To release the defendant from liability on his subscription upon the ground particularly insisted on at the argument, under the circumstances developed by the record, would be to introduce into our jurisprudence a system of *naked technicalities, disorganizing in their application* and pregnant with disaster and ruin to all the great enterprises in which our young and growing State has so largely embarked. We here repeat in substance what has heretofore been enunciated by the Court, that while these corporations are to be held in strict accountability and to the careful observance of the limitations of their chartered powers, the cause of justice, the best interests of society and the general weal of the commonwealth require that the practice of the utmost good faith should be rigidly enforced between them and their stockholders.

Another prevalent error upon this point is, that of holding that an agreement to take stock in a railroad corporation is to be viewed simply in the light of a contract between individuals, and that it is subject to the same rules that are applicable to private contracts; but such is not the case and for very manifest and obvious reasons, which commend themselves to the commonest understanding as being based upon consideration of the highest import. When a man enters into a private agreement with another, the individual interests of each (with which the public have no concern) are alone involved, and no change or alteration of the slightest character may be

made without the mutual consent of the parties *expressly given*. Each stands to the "bond," even to the exaction of "the pound of flesh." Not so, however, in the case of a subscription to the stock of an incorporation which owes its existence to the creative power of the Legislature and is always designed and intended to subserve, in some measure, the public good. In such case, the stipulations of the contract are contained in the charter alone and are of a general character. The individual subscribes to the contract with the distinct knowledge and understanding that its terms may be varied at any time by a concurrence between a majority of his associates and the Legislature, and that, too, without his *assent* and in defiance of his *dissent*. Nay, he subscribes with the distinct knowledge that, with such concurrence, the terms of the charter may be totally altered, so that the corporation may be authorized to embark in new enterprises wholly and essentially different from those originally contemplated, and that his only remedy is to *dissent and withdraw from the association*.

With these distinguishing features, can it be seriously contended that a mere subscription to the stock of a corporation stands upon the same footing and is to be governed in all respects by the general law of contracts as applicable to private or individual agreements?

The Court has not been neglectful of the adjudicated cases which were cited by the counsel on both sides, but, upon a careful examination of these cases, we have found so much looseness of expression, so much mere *dicta* and such a conflict of views upon the various questions discussed, that we have chosen rather to base this argument upon a few plain fundamental principles than to attempt to reconcile authorities which are clearly irreconcilable. To guard against misapprehension, we remark in this connex-

ion, that where, in the body of the subscription, there is a stipulation for a *particular* enterprise, as for the building of a road to a particular place, or for its location upon a specified route, such a stipulation being outside of the terms of the charter, is in the nature of a *condition precedent*, and, unless strictly complied with by the corporation, the party subscribing is absolved from his obligation to pay. We hold, then, that this instruction was in strict conformity with the law, and upon the state of the evidence as developed in the record, that it was conclusive of the case.

For the purposes of the foregoing argument, it was *assumed* that the original charter of the P. & G. R. R. Co. had been radically changed and altered by the acceptance by the Company of the provisions of the Internal Improvement act. But if this, upon examination, should turn out to be so in *point of fact*, it will be readily perceived that such conclusion would not avail the defendant; for, from the view which we have taken of the question involved in the discussion of the fifth instruction, the *onus* of approving affirmatively his *dissent* to the alleged alteration was upon him. It therefore becomes unnecessary to the decision of the case to enquire as to the effect of the acceptance of the provisions of the act upon the charter of the Company, and we pass to the sixth exception embraced in the assignment of errors, which complains of the instructions given by the Court as having been calculated to mislead the jury in the formation of their verdict. We have carefully examined the instructions with reference to this exception, and have come to the conclusion that the defendant has no cause to complain of them in this respect, for they are certainly more favorable to the defence than he was entitled to demand.

It is therefore ordered and adjudged that the judgment

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of the Circuit Court of Leon Circuit, rendered in this cause, be affirmed with costs.

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REASON D. PRESCOTT, APPELLANT, VS. WILLIAM H. JOHNSON, APPELLEE.

1. The establishment of a lost note under the statute is no bar to any defence that might be set up to the original note.
2. Where a promissory note has been negotiated before due, under circumstances which, at common law, would authorize an inquiry into the consideration thereof, the same enquiry may be made under a plea of failure of consideration, filed on oath, under the statute.
3. Where the plea of failure of consideration of a promissory note is filed under oath, according to the statute, the statute throws the onus of proving the consideration thereof upon the plaintiff.
4. Where a new trial is moved for on the ground of a misdirection, calculated to raise an immaterial issue, if the Court see that justice has been done between the parties and there was no evidence by which they could have been misled, they will not disturb the verdict.

This case was decided at Jacksonville.

Appeal from Duval Circuit Court.

For the facts of the case reference is made to the opinion of the Court.

*Philip Fraser* for appellant.

*W. A Forward* for appellee.

PEARSON, J., delivered the opinion of the Court.

Assumpsit on two promissory notes made by William H. Johnson, the defendant, payable to one James Anderson or bearer. The consideration appears upon the face

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of the notes, to wit: "For value received for a certain boy Isaac." The notes are dated December, 1856, and payable as follows:

First note, \$200, payable 1st of February, 1855.

Second note, \$325, payable 1st January, 1856.

There are six pleas in the cause upon which issue was taken, the substance of which are,

First, That said promissory notes were not the property of said plaintiff.

Secondly, That the consideration for which said notes were given *had wholly failed*.

At the trial in the Circuit Court, holden in and for the county of Duval, the following appeared to be the facts of the case:

One James Anderson, a transient person, sold to W. H. Johnson a negro boy Isaac, for \$1,000. Part was paid down and the notes, the foundation of this action, were given for the balance of the purchase money; that on or about the time the first note became due the said Prescott made repeated visits to the store of the said Johnson, and frequently conversed with the witness, a clerk of said Johnson, about said notes and the probability of their being paid at maturity, at the same time stating that he was not the owner of the notes, but could get them at a "great shave;" also, when asked where Anderson was, equivocating and refusing to give his "whereabouts." It also appeared, that said Prescott was told by said clerk of Johnson that said notes would not be paid if the consideration failed. It also appeared from the testimony that said Prescott, at these conversations, related to the witness what the notes were given for and acknowledged he knew all about the sale of said negro boy Isaac to said Johnson, as also the terms of the sale. All these facts, it appeared, were known to said Prescott at a time

when he said he did not own the notes, but that Anderson had them.

The original notes were not produced at the trial, but, in lieu thereof, copies established after the commencement of this suit, under the statute of Florida, were read in evidence.

The plaintiff offered no testimony excepting the established copy of the notes. It did not appear that the original notes were ever seen in the hands of said Prescott.

The counsel for the plaintiff asked the Court to charge the jury:

1. That the establishment of lost notes by law, as contained of record, is *prima facie* evidence of ownership in the person in whose behalf they are established as fully as the actual possession of the original note would be.

2. That the maker being notified of the institution of proceedings to establish lost notes and failing to appear and make defence, is stopped by the judgment of the Court from disputing the title of the person establishing the same.

3. When a promissory note is transferred before it becomes due, in order to invalidate it in the hands of the transferee, the defendant must prove failure of consideration and notice of such failure to the transferee before the transfer brought clearly home to him.

4. That the jury are the sole judges of the facts and the credit of the testimony. If they do not believe a witness, they will reject his testimony.

The Court refused the second instruction and gave the others.

The counsel for defendant asked the Court to charge the jury, that,

1. If the plaintiff (Reason Prescott) has not the possession of the notes, nor either of them, by reason of any inter-

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est he has in them, and his name has only been used as plaintiff, this does not make him a holder or assignee. It is not as *agent*, but as holder or assignee, that the plaintiff must show his right to maintain suit.

2. If you find from the evidence that said promissory notes, or either of them, were transferred after they became due, and that said boy Isaac was, at the time of the sale, the property of Aldrige Braddock and has since been recovered by the said Aldrige Braddock, that therefore the consideration has wholly failed and the plaintiff is not entitled to recover said notes, or such one as you may find was transferred after it became due.

3. Consideration of a note transferred before due can be enquired into where circumstances of suspicion appear. If you find that the said Reason Prescott, at the time of receiving said notes, or either of them, had knowledge said boy Isaac was claimed as the property of Aldrige Braddock by said Braddock, and that said claim was afterwards perfected and therefore there was a want of consideration, then the plaintiff is not entitled to recover.


Which instructions were given by the Court, and the jury found a verdict for defendant.

Motion was made for a new trial on the following grounds, to-wit:

1. Because the verdict is against the evidence.
2. Because the verdict is against law.
3. Because the verdict is against the manifest weight of evidence.

Which motion for new trial was denied, and this cause comes up to be heard on writ of error to the judgment rendered in said Court.

The statute providing for the establishment of lost papers (see Thompson's Digest, 361,) declares that "*all copies of papers established as herein prescribed shall be*



*as valid and effectual for all legal purposes as the original could have been had the same not been lost.*" This provision of the statute seems clear, and under it, we think, the establishment of a copy in lieu of the original was no more than an admission that he (Johnson) gave such notes, and the establishment of a lost paper can have no more force than the recovery of the original; and reading the copy in evidence, although established under the statute, could not operate as an estoppel to any defences which might have been set up against the original had the original been read in evidence. Therefore we do not think the Court erred in refusing the charge as prayed.

The next question to be considered is the plea of failure of consideration, which appears by the record to have been *sworn to* and filed in the manner prescribed by the statute in such cases.

The 24th section of the act of November 23d, 1828, (see Digest, 331, ) reads as follows: "*And it shall not be necessary for the plaintiff to prove the execution of any bond, note or other instrument of writing purporting to have been signed by the defendant, nor the consideration for which the same was given, unless the same shall be denied by plea put in and filed as aforesaid.*"

It will be observed the expression of the statute is, "*the consideration.*" It does not say want of consideration, or failure of consideration, but says "*the consideration.*"

In the case of *White vs. Camp*, 1 Florida, p, 95, this Court said: "Upon the oath being taken, in compliance with the requisitions of the statute, and by *proper parties*, the *onus* of proof is thrown upon the plaintiff, and he is bound to prove the consideration of the instrument upon which suit is brought."—1 Florida, 100.

From this it would seem that the *onus* of proving the consideration where plea of *failure of consideration* is

put in on oath is upon the plaintiff in *cases* where the consideration can be enquired into.

The case of Hagler vs. Mercer, reported in 6 Flo., 342, was a case entirely upon the admissibility of a plea. The question was whether the affidavit was necessary to permit the plea of failure of consideration to be filed, the Court determining only that the plea was admissible and good at common law, but did not change the *onus* of proof except in cases where it is sworn to.

Suffice it to say, that, in deciding this case, the Court entertains the same view of the statute it did in the case of White vs. Camp. As this is an action, not between the original parties to the notes, but between the holder as assignee and the drawer, we are called upon, in the next place, to ascertain whether as between such parties the consideration can be enquired into at common law. The Court charged the jury, that "consideration of a note can be enquired into where circumstances of suspicion appear."

It is laid down in Story on Promissory Notes, page 237, §197: "*It will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon enquiry.*"

In Down vs. Halling et al., 4 Barnwell & Cresswell, 332, the Court held: "The jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which *ought to have excited the suspicion of a prudent man.*"

The case of Cone vs. Baldwin, 12 Pickering, 545, goes to say: "In an action by the holder against the maker of a negotiable note, founded on a consideration which failed, the defendant is not obliged to prove that the plaintiff purchased with full and certain knowledge of the want

or failure of consideration. *If the circumstances attending the transfer* were such as to put him upon his guard and he made no enquiry into the consideration, he purchased at his peril."

From these cases we find, that at common law, where circumstances of suspicion appear, the holder of a negotiable instrument, taken before due, may be required to prove consideration.

The defendant in the Court below pleaded failure of consideration under *oath*, and adduced proof that the plaintiff took the notes sued upon under suspicious circumstances. The jury so found under the evidence, and this Court is not prepared to say their verdict was contrary to evidence. It follows, then, that the *onus* of proof that the consideration had not failed was upon the plaintiff. On this point we do not find one particle of evidence.

We think the second instruction asked for by defendant's counsel and given by the Court was erroneous and might have been calculated to mislead, if there was any evidence upon which they could, under this charge, have been misled. The words of the charge were, "*If you find from the evidence,*" the title and recovery of Braddock, &c. There being no legal evidence at all, the jury could not have been misled—therefore the charge was innocent. It is manifest to us from the evidence, that whether this charge had been given or not, the verdict would have been the same. The case seems to us so developed that there could have been no recovery without proof of title in the vendor. We think, therefore, a new trial would have been fruitless; and, where the Court are satisfied a new trial, would not bring about a different result, it is not proper to grant one. But, without further discussing that point, we think the verdict was sustained by the evidence; and, while we consider that there was error in the last men-

tioned charge, we do not consider it sufficient to set aside the verdict and grant a new trial.

In Edmondson vs. Mitchell, 2 Dunford & East, page 4, it is laid down, that "where a new trial is moved for on the ground of a misdirection in point of law, if the Court see that justice had been done between the parties, they will not set aside the verdict nor enter into a discussion of the question at law." And this principle has been settled by this Court in the case of McKay vs. Lane, 5 Flo., page 276, and substantially reaffirmed in Doggett vs. Willey, 6 Florida, 482.

The defendant by this plea under oath having stated that the consideration of said notes had wholly failed, the burthen of proof to the contrary was upon the plaintiff. He having failed to make such proof, the judgment of the Court below is affirmed with costs.

DUPONT, J., dissenting.

Concurring as I do in so much of the opinion delivered in this case as states the effect to be given to the established copy of a lost paper, I am nevertheless constrained to *dissent* from the judgment of affirmation as well as from the grounds upon which that judgment is placed. In order that my views may be fully comprehended and properly understood, I commence with the third exception embraced in the assignment of errors, which complains that the Court erred in giving the instructions asked by defendant's counsel. These instructions are as follows:

"1st. If the plaintiff (Reason Prescott) has not the possession of the notes, nor either of them, by reason of any interest he has in them or either of them, and his name has only been used as plaintiff, this does not make him a holder or assignee. It is not as agent, but as holder or assignee, that the plaintiff must show his right to maintain suit.

"2d. If you find from the evidence that said promissory notes, or either of them, were transferred after they became due, and that the said boy Isaac was, at the time of the sale, the property of Aldridge Braddock and has since been recovered by the said Aldridge Braddock, that therefore the consideration has wholly failed and the plaintiff is not entitled to recover said notes or such one as you may find was transferred after it became due.

"3d. The consideration of a note transferred *before* due can be enquired into when circumstances of suspicion appear. If you find that the said Reason Prescott, at the time of receiving said notes, or either of them, had knowledge that the said boy Isaac was claimed as the property of the said Aldridge Braddock by said Braddock, and that said claim was afterwards perfected, and that therefore there was a want of consideration, then the plaintiff is not entitled to recover."

In considering the propriety of these instructions, which have been made the subject of exceptions, I remark, that whatever diversity of opinion may exist as to the right of the maker of a note made payable to "bearer" to call in question the title or ownership of one who sues as bearer in ordinary cases, in this case the right cannot be questioned. Here the only material difference set up against the recovery upon these notes was, that the consideration for which they were given had totally failed. This defence would not avail, nor was it admissible against the present plaintiff if he had received a *bona fide* transfer of the notes *before* they became due. If, however, it should be shown that the property in the notes was still in the payee and original holder, and that the name of the plaintiff suing was used only as a sham and a blind, it is clear that the fact so shown to exist might be made available to the de-



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fendant against the nominal plaintiff without further enquiry with respect to the time (whether before or after due) when the alleged transfer may have been stated to have been made. In this view of the case, I have no hesitancy in sustaining the first instruction asked for on the part of the defendant; and had the instructions stopped at that point, I should as unhesitatingly have sustained the judgment rendered upon the verdict of the jury in the Court below. But such was not the case. The Court proceeded to give the 2d and 3d instructions asked for by the defendant, the giving of which, in my opinion, was a most fatal error.

I am well aware that it is not every erroneous instruction that will vitiate a verdict, but where the instruction is of such a character as to be manifestly calculated to mislead the jury, either from being irrelevant to the issue or unsupported by any evidence in the cause, such instruction has been universally held to constitute error sufficient to call for a reversal. Now, as to these instructions, it will scarcely be pretended that the record affords one title of evidence with regard to a failure of the consideration, and it is only necessary to refer to the position of the case before the jury to be convinced that the instructions were well calculated to mislead them as to the true issue to be tried by them.

The material defence relied upon by the defendant was, the *failure of consideration*, and it was set forth in the pleas by the allegation that he had been ousted of the property for which the notes were given by one asserting a paramount title to the same. The only witness to this point was William C. Trowbridge, whose testimony was adduced in the form of a deposition. In his responses to the 9th and 10th interrogatories is contained *all* that bore upon that point. The answers, it is true, were quite full,

but, unfortunately for the case of the defendant, all that he said upon that subject was merely "hearsay," and was very properly *ruled out by the Court*. With the exclusion of this testimony, the pleas which set up the defence stood wholly unsupported by one particle of evidence. If with these pleas before them, which *circumstantially* set forth the mode and manner of the alleged failure, the hearsay testimony of Trowbridge discussed in their presence and hearing, and then the rulings of the Court to the very point, the jury were not likely to be misled as to the particular matter that they should legally decide upon, I am at a loss to conceive of a case in which an erroneous ruling of the Judge would be likely to mislead them.

It is assumed, however, by the majority, that the pleas setting up a "failure of consideration" having been verified by the oath of the defendant, it was incumbent upon the plaintiff, under the provisions of the statute, to *negative* the alleged failure by proof on his part. In other words, that the oath of the defendant changed the *onus*, and that it was for the plaintiff to prove that the consideration had not failed. It is proper to remark here, that the notes disclosed on their face the consideration for which they had been given, being for the "boy Isaac."

I had thought that the ruling in Hagler vs. Mercer (Flo. Reports) had put that question at rest. It was distinctly ruled in that case that the statute went no further in its effect than to require of the plaintiff, when the plea should be verified by the oath of the defendant, to *disclose* and set out the consideration, and that the *failure*, if any, must be established by affirmative proof brought forward by the defendant. It is now said that the ruling is of no authority, as the point ruled did not arise in the case. With the utmost respect for the opinions of my Associates as to the ruling in that case, I am constrained to differ with them,

and to hold that the particular point which arose in that case legitimately involved the construction and interpretation of the statute, and that it could not have been properly considered without such construction and interpretation. But I hold, moreover, that that ruling upon the effect and operation of the statute was eminently proper, and that the distinction therein taken between the *want* and *failure* of consideration was correct.

Apply the present views of the Court to the pleadings in this case and the correctness of the ruling in Hagler vs. Mercer will be clear and obvious. The copy of the notes attached to the declaration fully *disclose* on their faces the consideration. They were given for the purchase of the "boy Isaac." The plea alleges a *failure* in consequence of the "boy Isaac" having been recovered from the defendant in action at law prosecuted in Macon, Georgia, by Aldridge Braddock. Now, suppose that, in conformity with the present views of the Court, the plaintiff had proceeded to show that at and for a long time previous to the sale to the defendant he had been in peaceable possession of the boy—suppose that he had proceeded further to show that he had bought him in good faith from a third party, and had exhibited his paper title from said party, and so *ad infinitum*, would all this have been sufficient to *negative* the particular allegation in the plea, viz: that "the boy Isaac had been recovered in Macon, Georgia, by Aldridge Braddock?" No, he must go on further and prove that the allegation was false, by showing either that there never was such an individual as the one named, or that there was no such locality as Macon, Georgia, or that there was no Court holden in that locality, or that there never was any such suit instituted upon which a recovery could have been had. Suppose, again, that instead of the allegation of a failure of title, it had been that the boy was

affected at the time of the sale with a particular disease, of which he had afterwards died, how would the plaintiff go about *negativ*ing the fact of the disease and the other fact of the death by that particular disease, the property in the meantime having passed through a dozen hands, probably, and removed hundreds of miles from him? If the statute is to have the operation now contended for, the sooner it is known the better, in order that the mind of the Legislature may be called to the subject.

The case of *White vs. Camp* (4 Flo. Reps.) is referred to in the opinion as supporting the present views of the Court. The single question in that case was as between what parties the consideration could be impeached, and it was particular in stating that he considered the opinion of the original parties of those standing in that light, according to the principles of the common law. At the time that this decision was made the bench was occupied by Judges Hawkins, Douglas and Baltzell, (the present Chief Justice,) and it is worthy to be noted that Judge Douglas was particular in stating that he considered the opinion of Judge Hawkins, who delivered the opinion of the Court, not to extend beyond that particular point. It is also worthy of note, that Judge Baltzell, who *dissented* from the judgment pronounced in that case, utterly repudiated the idea that the statute had the effect to change the burthen of proof (as it stood at common law) *in any case whatsoever*. How, then, can it be said that the ruling in *White vs. Camp* supports the views of the Court, as it is contended in the opinion delivered in this case?

It was insisted, in this connection, by the counsel for the defendant, that there being three issues before the jury, and their finding being general, if the law and evidence on either issue is sufficient to sustain it, the general finding will be held to be good. I am not disposed to contest

(as a general proposition) the doctrine contented for, but, in this case, it will be noted that the failure of the consideration was the gravamen on gist of the defence, and constituted the material issue to be tried. It was not enough to found a verdict upon, that the jury should arrive at the conclusion that the notes had been transferred *after* they were due, or that the alleged assignment was attended with suspicious circumstances. That constituted no bar to the recovery—it only opened the way for letting in the defence of the failure of the consideration, which, as before stated, was unsupported by a particle of evidence.

In this connection, the counsel for the defendant further insisted, that as there was a plea which put in issue the plaintiff's ownership of the notes, and as there was *some evidence* applicable to that issue, the verdict, though general, might be taken to apply to that issue. This view of the subject struck me at first with some force, and were I now confident that it was the right of the maker of the note, payable to bearer, to contest the holder's title to the same, it might relieve me of some of the difficulty that I feel in sustaining the judgment in this case. But I am not satisfied upon that point, nor would I be understood as indicating an opinion one way or the other. It is at least a mooted question and one that has engaged the attention of the Courts.

From what has been said, it may be seen that I base my *dissent* exclusively upon the ground that the two instructions before referred to, being responsive to the material issue in the case and entirely unsupported by any evidence, they were eminently calculated to distract the mind of the jury and to lead them to the consideration of a matter which they had no legal right to consider. It is of the last importance to parties litigant that everything calculated to confuse or mystify should be carefully ex-

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cluded from the case submitted for their determination, and the naked point in issue be clearly presented to their minds; and when the appellate tribunal discovers that a different course has been pursued, it is its high prerogative and bounden duty to apply the proper corrective.

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STANLIUS GLINSKI AND WILLIAM H. GILLILAND VS. JOHN  
ZAWADSKI AND WIFE.

1. Where the object of the bill is to compel the "specific performance" of a contract, if the prayer be denied, (as a general rule), the bill will be dismissed; but there are exceptional cases, as where equity is found to have arisen between the parties to the contract growing out of its peculiar character or nature. In such case, the bill may be retained for the purpose of having that equity adjusted.
2. Where one contracts to purchase real estate and proceeds to erect improvements thereon, if compensation therefor be decreed him, the *amount* is to be based upon the actual *value* of the improvement, or, at farthest upon a *reasonable allowance*, and not upon the amount expended.
3. A *bona fide* purchaser for value will not be affected by any prior existing equities of which he had no notice at the time of his *purchase*, but a "purchaser" in this connection is one who gives a *present* value for the purchase (either by the payment of money or the surrender of a security.) If the consideration be founded upon a pre-existing debt, the rule does not apply.

This case was decided at Jacksonville.

Appeal from Putnam Circuit Court.

This was a suit in equity, brought by Zawadski and wife against Gilliland and Glinski, to compel the latter to make title to a lot in the town of Palatka, which the complainants allege they purchased from said Glinski, and upon which they erected a building and expended large sums of money. There was no bond for title on record,

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though the bill states that one was executed. Glinski mortgaged the lot to Gilliland. The mortgage was foreclosed and the premises sold under execution in favor of James Burt, Agent of the Bank of Charleston. The complainants pray that this mortgage be set aside, and that defendant be decreed to execute a good and sufficient conveyance to them, on the ground of their alleged prior equity. The questions which arose in the case, and which were considered by the Court, are stated in the opinion. The main facts upon which the questions in the case arose are also sufficiently stated or referred to. The Chancellor, the Hon. Wm. A. Forward, made the following decree:

*Imprimis.* That the prayer of said bill of complainants that the said Stanlius Glinski be required especially to perform the alleged agreement and execute title of said lot No. 9, in block No. 91, be denied and not granted.

Secondly. It appearing to the Court from the circumstances of this case as disclosed that the said John H. Zawadski and Mary E. Zawadski entered upon the said tract of land under an agreement with said Glinski, either as "tenants" or purchasers thereof for value, and while thus in possession, by and with the knowledge and consent and agreement with said Glinski, expended money in lasting improvements upon said lot in erecting the said Pulaski House and premises in said bill of complaint mentioned, and also became security on the acceptance of the joint draft in said bill of complaint mentioned, and supplemental bill mentioned, which sums thus expended and paid the said Glinski held in trust said premises for the said Mary E. Zawadski, and which said lot, with Pulaski House thereon erected, he, the said Glinski, while the said Zawadski and wife were then in possession, mortgaged to the said Gilliland for himself and others to secure the payment of *antecedent debts* which said Glinski owed to said Gilli-

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land and others, defendants, and the Court being satisfied the prior trust must prevail and the same be established as a prior lien on the said lot and premises after deducting any set-off established by said Glinaki and any rent for time the said Pulaski House and premises were occupied by said John H. and Mary E. Zawadski up to the time of the sale of the same under execution of foreclosure of said mortgage. To ascertain the same, it is *ordered* that this cause be referred to John L. Kirkland, a Master in Chancery of this Court, to take an account of the money paid and money expended in lasting improvements upon said lot of land and Pulaski House and premises by the said John H. Zawadski and wife, or either of them, from the date of their or either of their taking possession of said lot, and also to take an account of any indebtedness of said John Zawadski and wife or either of them, with said Glinaki, which indebtedness is or should be a legal and just set-off in this cause, and also to take an account of the rent of said Pulaski House and premises from the time the said house was occupied by them up to the day of the sale under the execution in favor of said Gilliland, and also of the amount paid by Mary E. Zawadski, or said John H. Zawadski, upon the execution in favor of James Burt, Agent of the Bank of Charleston, in said supplemental bill mentioned, and to ascertain the balance (if any) due the said Mary E. Zawadski on this behalf, and also to take an account of the rent of said premises since the sale under the execution of said Gilliland and others, and that the said Master in Chancery do report the same to this Court with all convenient despatch.

*Gillis and Sanderson* for appellants.

*Braham and Burritt* for appellees.

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Gliniski and Gilliland vs. Zawadski and wife.—Opinion of Court.

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DUPONT, J., delivered the opinion of the Court.

The petition of appeal, filed in this cause, presents but two questions which are material to be considered by this Court, viz: 1st, the propriety of retaining the bill after the prayer for a specific performance had been refused, and, 2d, the correctness of the data upon which the compensation or damages were ordered to be assessed.

It was insisted for the appellants, that whenever a bill is filed asking for the specific performance of a contract or agreement, if the Court should find that the prayer could not be granted upon the pleadings and proofs in the cause, the jurisdiction of equity terminated and the bill should be dismissed. It was further insisted, that compensation could not be decreed when specific performance is denied. As a *general rule*, the doctrine contended for is undoubtedly correct and was maintained with marked ability by Justice Thompson in the opinion delivered in the case of Lewis and wife vs. Yale, (4 Flo. Reports, 437;) but it is only as a general rule that it can be said to be the established doctrine of the Equity Courts. There are exceptional cases, and whenever a clear equity is found to have arisen between the parties to the contract, growing out of its peculiar character or nature, there can be no doubt that the Chancellor is authorized to retain the bill for the purpose of having that equity properly adjusted.—2 Story's Eq. Ju., § 714, § 796; 1 Cowan's Reports, 711; 1 McCord's Ch. R., 112; 2 Vesey, Sr., 243.

The case of Parkhurst vs. Van Cortland (1 Johnson's Ch. Reps., 286,) is full to the point, and recognizes the existence of these exceptional cases. We are satisfied that the circumstances of this case, as disclosed by the record, constitutes it one of the exceptional class and brings it within the principles of the authorities above cited. It is mani-

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fest that a specific performance could not have been decreed even if the defendant Gliniski had not parted with the title to the lot, and it is equally manifest that equities had grown up between the parties in the nature of a partnership, arising out of the mutual contribution to the erection of the buildings upon the lot, which required the adjustment of a Court of Equity. That there was some agreement between Gliniski and Zawadski for the sale and purchase of the lot is quite apparent, but its precise terms are left in much doubt and uncertainty, even where resort is had to the bill and answer to ascertain them. It was altogether a loose transaction, entered into in a spirit of confiding friendship, and unfortunately resulted, as such transactions not unfrequently do, in a disruption of the friendly relations of the parties. We think, then, that the Chancellor acted correctly in retaining the bill and in ordering an account to be taken as a basis for the decree to be rendered.

This brings us to the consideration of the second point noted, viz: The data that should form the basis of the account upon which the damages are to be predicated. It was insisted for the appellants that the "value" of the premises at the date of its sale under the foreclosure of the mortgage to Gilliland, and not the amounts contributed by the complainants Zawadski and wife for improvements, should form the basis of the account, and we think there is much reason for this position. It will not be pretended that the complainant Zawadski was blameless as to the controversy growing out of the agreement for the sale and purchase of the property. He was certainly an equal actor and participant in this most unwise and improvident contract, and, after he had entered into it, he was the first to make a failure by declaring his inability to erect the building and to make the improvements originally contem-

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Gliniski and Gilliland vs. Zawadski and wife.—Opinion of Court.

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plated, and it was at his solicitation that the defendant Gliniski was induced to invest his money in the enterprize. It would be a dangerous rule to adopt, in cases of this kind, to make the amount of expenditures the criterion of compensation to be allowed. A careless or extravagant man might make a very improvident application of the money expended in permanent and lasting improvements, and it would be unjust to visit his improvidence upon the other party. The better rule would seem so be to allow compensation only for the actual value of the improvements, or, at farthest, a reasonable allowance therefor, and in this view we are supported by the adjudicated cases.—*Vide* Parkhurst vs. Van Cortland, 1 John. Ch. Reps., 286.

The order of reference to the Master must be reformed and made to conform to this rule.

The rights of Gilliland, the mortgagee, are not presented by any one of the exceptions contained in the petition of appeal. It is the established rule of this Court that all exceptions to the decree of the Chancellor must be set forth in the petition which brings the case up; nor will the Court, except as matter of grace, consider or permit an argument to be made upon any other points than those thus presented. Such favor, touching the interests of the mortgagee, was accorded in the argument of this cause, and his rights were prominently presented for our consideration. It was insisted in his behalf that he stood before the Court as a purchaser without notice and for a valuable consideration, and that his title, obtained as the purchaser under the sale upon the foreclosure of the mortgage, was not affected by any prior equities existing between the complainants and the mortgagor. It is undoubtedly correct, as a general proposition, than a *bona fide* purchaser for value will not be affected by any prior existing equities of which he had no notice at the time of

his purchase. The authorities in support of this doctrine are quite full. It is laid down in Coote on Mortgages, (227.) "That the lien of a covenantee for the settlement of an estate will be postponed to that of a subsequent legal mortgagee of the estate." And, in Sugden on Vendors, it is said: "If one agree to purchase an estate and take a contract or covenant that the owner will sell that estate, and the latter should sell or mortgage it to another person, who has no notice, the first purchaser has not any right to call on the second purchaser for the legal estate but the latter may protect himself by the legal estate against the former."—*Vide* 1 Sug. on Vend., 191, citing 8 Price, 488-9; 2 Har. & John., 55, Dennison vs. Robinett; 1 John. Ch. Reps., 298, Frost vs. Beekman; 1 Car. Law Reports, 508, Benizen vs. Lerroir.

Indeed there would seem to be no controversy on the point, and that the doctrine is well established. It then becomes our duty to enquire if Gilliland, the mortgagee, occupies the position of a *bona fide* purchaser for value. As to his character as "purchaser," it has been ruled by this Court that a mortgagee is to be considered in the light of a purchaser.—Gibson vs. Love, 4 Flo. Reps., 232. With respect to *notice*, it is also fully established that he had no notice, either actual or constructive, of the lien of the complainants at the time that he took the mortgage from Glinaki, the then holder of the legal title to the lot in controversy. But was he such a *purchaser for value* as is contemplated in the authorities above cited, and such an one as would be protected against the prior equities of the complainants? As between parties situated as these are, it will be found that when the cases speak of a purchaser *for value* they mean to designate one who gives a *present consideration* for the transfer, and not one who bases his title upon a *pre-existing debt*. The distinction here noted will

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Glinski and Gilliland vs. Zawadski and wife.—Opinion of Court.

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be found to be abundantly sustained by the decided cases, and we think that is based upon sound equitable principles. The mortgagee obtained only an *equitable* interest in the property mortgaged, and unless an actual consideration (as the payment of money at the time, or the giving up of a security,) be the moving cause for the execution of the deed, there seems to be no sound reason why his mere equity should override and postpone the *prior equities* of other parties. The maxim of "*Que prior in tempore potio est in jure*" is eminently applicable to parties standing in this relation.—Thompson vs. Hale, 6 Pick., R., 259; Bay vs. Coddington, 5 John. Ch. R., 56; Stalker vs. McDonald, 6 Hill's R., 93; Clark vs. Ely, 2 Saund. Ch. R., 166; Bradley vs. Calvin, 4 Barb. S. C. R., 304; Done vs. Shutt, 2 Denio R., 621; 16 Georgia R., 471; 3 Edward's Ch. R., 182; Manningford vs. Toleman, 1 Collyer's Reps., 670; Becket vs. Correlly, 1 Bro. C. C., 353; Tourville vs. Naish, 3 Peer Wms., 308.

Applying these principles to the facts of this case and it will be seen, that Gilliland, in taking the mortgage from Glinski, took it *coupled* with a *trust* for those having *prior equities*, amongst whom were the complainants. In the joint answer of Gilliland and Glinski, the latter, in response to the eighth interrogatory in the bill, says: "They (Gilliland and others) *had advanced* cash for me to take up my notes, which fell due in the Bank of Charleston, which notes had originally been given for materials and other things about said premises." By reference to the deed of mortgage, a copy of which is contained in the record as an exhibit in the cause, it will be made fully to appear that it was given to secure *antecedent debts*. It is not pretended that any *new or present consideration* was given for it, or that any *prior security* was given up. Gilliland, the mortgagee, by having his lien postponed to the

prior equities of the complainants, will stand in no worse position as to security for his debt than he was in at the time of accepting the mortgage from Glinski.

Let the decree of the Chancellor, in so far as it conflicts with the views expressed in this opinion, be reversed and set aside, and let the cause be remanded for such further proceedings in the premises as may be conformable to these views. The costs of this appeal to be paid by the appellees.

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JOSEPH FINEGAN & CO., APPELLANTS, VS. L'ENGLE & SON,  
APPELLEES.

1. In the construction of road-beds for a railway, a substantial *bona fide* compliance with the terms of the contract in the execution of the work should be insisted on, and it is no excuse that a portion of it may be executed at a trifling expense—at the cost of a few dollars. Completion is the word, as near as may be, and the engineer is inexcusable in allowing a mere formal completion with the contract.
2. A party is not entitled to compensation where his work is completed by another, he having abandoned and left is unexecuted.
3. By the terms of this contract, the work was to be done to the satisfaction of an engineer of the road. This is an appropriate engagement and will be enforced and carried into execution by the Court, and whilst his certificate will not be regarded as conclusive and unassailable, yet it will be without fraud or special showing to avoid its effect.
4. Courts of Equity will give relief in such cases as a general rule, nor are Courts of law impotent to give it in a proper case.
5. A plea in abatement, that by the agreement the Chief Engineer should in all cases decide every question which might or could arise under the contract, is not maintainable. If pleadable, it should be in bar.

This case was decided at Jacksonville.

Appeal from Duval Circuit Court.

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Finegan & Co. vs. L'Engle & Son.—Opinion of Court.

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The opinion of the Court contains a statement of the facts of the case, to which reference is made.

*G. W. Call* for appellants.

*Burritt* and *Forward* for appellees.

BALTZELL, C. J., delivered the opinion of the Court.

L'Engle & Son, plaintiffs in the court below, contracted with the defendants Finegan & Co. to "execute all the gradation on that part of the Florida Railroad included between sections 1,240 and 1,248, comprising ten miles, more or less, and to furnish all the sills and cross-ties required for the same, together with all hewed timber necessary for the construction of drains or trestles on said portion of said road." After providing for the mode of execution of the work by special articles, not necessary to be particularly noticed here, it was further agreed that "the work should be justly estimated, received and paid for by the terms of the contract, after the completion of each consecutive section of five miles, and at the end of thirty days from the commencement of the work, the parties of the second part should cause a proper estimate of the work done to be made, and pay to the parties of the first part seventy-five per cent. of the amount due for said work in cash, reserving twenty-five per cent. of said amount until the completion of the section of five miles, which reserved twenty-five per cent. should be then paid," &c.

Plaintiffs complain, alleging "performance of the first five miles to the satisfaction of the Engineer and of defendants, and of the failure to pay agreeably to the contract made; of the not making further estimates nor pay for extra work, by reason of which they were unable to go on with their work and were compelled to abandon it."

Defendants take issue on these allegations and insist,

that "the plaintiffs did not perform the work on the first section of five miles to the satisfaction of the Engineer of the road and of defendants;" "that they abandoned the contract and wholly refused to perform a large part of the work stipulated in said contract;" "that they were not compelled, from non-performance of said agreement by defendants, to abandon their work;" "that defendants had fully performed all things stipulated to be performed by them when plaintiffs abandoned their work;" "that plaintiffs wholly failed and refused to perform said work according to the direction of the Chief Engineer, as by the contract it was stipulated it should be performed."

These issues were submitted to the jury with instructions. Upon them the jury found a verdict for the plaintiffs. Upon which defendants moved for a new trial, which the Court refusing to grant, they excepted, so as to present the facts and bring this question before this Court for its consideration.

Whether this motion should have been granted can alone be determined by the testimony—by an ascertainment of the facts bearing upon the contract between the parties. It is satisfactorily shown that estimates were made, at the expiration of thirty days, by the Engineers, for work performed for the months of September, October, November, December, January, February, March, April and May, up to the time of abandonment, and that payments were made in full compliance therewith to the amount of \$12,821 62.

Mr. Butler, the Engineer in charge of the road, deposes, "that a final estimate was demanded of the five miles and refused by the Engineer, for objections stated to plaintiffs, that the work was not right. He supposed that L'Engle could see it as well as witness could, who said he would go

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Finegan & Co. vs. L'Engle & Son.—Opinion of Court.

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and do it. He does not think plaintiffs ever notified him that it had been done. The road was not trimmed according to the road pegs; the embankment was not up to grade in some places, it was over grade in other places. There were stumps that should have been taken out, and in some places there were ditches to be opened," &c. The entire statement of witness need not here be repeated, as this will give an idea of its contents.

The testimony of the Engineer in charge of the work disproves the allegations in the declaration as to the "performance on the first section of five miles to the satisfaction of the Engineer of the road and defendants" and the other allegations as to the making of estimates, and should be regarded as conclusive on the point, uncontradicted as it is by other testimony, and, more than all, having the weight due to it by the official position of the witness, especially accredited by the written agreement of the parties.

That we are not mistaken as to the other testimony in the case, we extract such portion of it as is applicable. Mr. Gregg, a Civil Engineer, engaged on an adjoining road, a witness for the plaintiff, says: "He went over all the road, except at station 1,304 a andquarter of a mile towards that station and speaks favorably of it." The work as far as he saw, was done as well as the work on his road. There was nothing wrong that witness could detect. He said at the time, he wished the work on his own road was as good. He yet states that he went over the work *without any instrument*. It was entirely out of his power to form any opinion by the examination he made as to how the grubbing and clearing was done. When an embankment is once built, no man can tell how the grubbing was done and before the embankment was put upon it. *The Engineer who superintended the construction of a*

*road-bed is the best evidence* of how it was grubbed. Witness would rely upon his testimony in preference to his own examination *after the embankment was made*. Witness cannot say whether all the ditches for draining the road-bed on the first five miles were built; he could see no omission. The turn-out and the Y track at Baldwin were not complete. The ditches are not such as the road requires at that place. Witness thinks they were staked, but not finished. Baldwin is on the first five miles. He did not measure the clearing, but thinks it was sixty feet wide. Witness cannot tell from his own examination whether all the logs, brush-wood and other perishable matter had been removed beyond the place occupied by the embankment, nor can he tell whether, under an embankment ten feet high or less, all the trees and stumps were grubbed, nor whether they were cut to the surface of the earth under an embankment over ten feet high." This is not the entire testimony of this witness, but will give a correct idea of its character and bearing.

Alfred A. Sears, another Engineer, examined for plaintiffs, says he was charged with laying the superstructure of the road, and saw no difference between the work done by plaintiffs and the balance of the road; noticed nothing peculiar in the road-bed. It was fit to receive the track as much as any part of the road. There was some trifling amount of grading to be done at the Northern end. There was a gap in the road there. Could not have been over two or three hundred cubic yards of work altogether that was necessary to put on. It made no difference, except the two or three hundred yards of extra work.

This is substantially the testimony of these witnesses, and sustains the Engineer in his testimony as to the non-performance of the work and the omission to complete it agreeably to the contract of the parties. In argument, it

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was urged that the work left unperformed was of little value, only a slight jog of a few hundred feet—a few stumps, extricable at an expense of a few dollars, to be disregarded as worthy of no consideration. We do not think so. Completion is the word, as near as may be, in works of this kind, without defects and with everything done to perform the contract, so that there may be a substantial *bona fide* compliance. If there is little to be done, there is less excuse for the not doing this little. One stump unremoved constitutes an obstruction—two hundred yards ungraded are equally required to be brought to the requisite level, and an Engineer would be highly culpable in disregarding such defects. This would be defeating the very object of his appointment, which is to secure a compliance with the contract in every essential respect. We have referred to this part of the testimony, not from any disposition to go outside of the proof given by the Engineer, but as sustaining it in all material points. Other testimony is clearly not entitled to the same verity—by the contract, by the parties' own agreement, it is not so entitled. The witnesses themselves take the correct view of the subject. They examined the work after it was done, but without instruments. The duty of the Engineer is to superintend and be present at its execution, and to apply to it the test of science and skill with the appropriate instruments. This is the best evidence, in our estimation. Whilst, then, satisfied upon this point, it remains to enquire into the other allegations, "that defendants would not pay the sum of \$776 18, due on an estimate for grading made in May, 1857, \$600 for sills and cross-ties and \$158. an additional sum for sills, nor pay for the works, nor cause monthly estimates of the work to be done, nor pay 75 per cent. of the amount due for the work, by reason of which plaintiffs were so obstructed in its perform-

ance as to be pecuniarily unable to go on with the work and obliged to abandon it." We are at a loss for the evidence to sustain these allegations. There is no proof as to the extra work—none to show a refusal of monthly estimates. We have already seen defendants were not entitled to an estimate for the five miles, and, in reference to the pay, there is proof of sums received amounting in the aggregate to \$12,821 62, whilst the estimates of the Engineer amount only to \$12,348 34, showing an over payment of \$473 28. A statement to this effect, giving the various items, was read in argument to the Court by counsel for the defendant, and not contradicted.

A letter was read in evidence from plaintiffs to defendants, insisting upon the allegations above noticed and setting up an additional ground in an alleged declaration, made by one of the defendants, that "they would pay no more money until the completion of the contract and would not pay the bonds due on the first section of five miles when it should be received by the Engineer," accompanied with an offer by plaintiff to resume work on receiving the \$776 and to complete the contract. We regard the letter as improperly read to the jury; but overlooking this and admitting its statements, we give but little value to its contents. Plaintiffs were in no need of additional assurances to their contract. They had the written agreement of all the defendants, engaging to pay on the performance of the work. What could the oral declaration of one of them amount to, that they would not pay? Obviously nothing.

In reference to the entire case on the part of the plaintiffs, there is a most glaring inconsistency. They allege that they were prevented from the completion of their work by the act of defendants and compelled to abandon it; yet evidence is produced and an effort made to show a substantial performance, which is insisted upon before the

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jury, and compensation claimed, as if the entire work had been performed. Not a little singular, too, by their own proof, only 2,700 cubic yards remained to the completion of the entire work, which, by their testimony, could have been executed in a few days with the hands they had in their employment—"in a couple of days, if there were no waters and the materials on the sides were found favorable." It may be true that this may have been the hardest and most difficult part of the work, yet this by no means adds to the strength of their case on its merits. Whether we regard the case, then, upon the testimony of the Engineer or the other witnesses, the performance by the plaintiffs of their contracts is not only not made out, but absolutely disproved. No satisfaction of the Engineer or of defendants with the work done on the first section of five miles, but, on the contrary, express dissent, disapproval and dissatisfaction made known to the plaintiffs, and an engagement on their part to remove it. No refusal to pay agreeably to estimates to excuse an abandonment of the work, but over-payment beyond the estimates. No obstruction nor prevention of the work by defendants, but rather aid and assistance from them in lightening the labor of plaintiffs and helping the performance. So far from just cause for abandonment of the work, there was every motive and inducement for renewed exertion, activity and diligence to complete it. It was on the very eve of accomplishment—a consummation required by the magnitude and importance of the undertaking, the true interests of all concerned and the just expectations of the public. Plaintiff's hands were all on the spot and could have done it more easily, with greater despatch, with less expense and trouble than any others. It could have been done in a period scarcely worthy of computation or estimate, and yet, without even a plausible excuse—with no cause what-

ever—it is abandoned and deserted. We may lament and deplore the consequences resulting from this rash act—it is beyond our power to relieve from its legal effects. Duty, stern and imperious, compels us to declare our convictions that their case was not made out, and that the verdict of the jury is not sustained by the evidence. A new trial should have been granted by the Court below, and in this refusal we think there was error.

With the view taken of the case, it is unnecessary to consider all the errors assigned. The third instruction to the jury is perhaps the only one requiring a notice from us. It asserts, that “if the jury find from the evidence that the work done and the materials furnished by the plaintiffs were so done and furnished by the consent, expressed or implied, of the defendants, as if the defendants have accepted and retained the work and materials and derived benefit from them, then the plaintiffs are entitled to recover in a *quantum meruit* the balance of the work and materials.” This is so directly opposed to the view we have already taken of the evidence in the case that it would scarcely require comment, but for the appearance of right in presenting the defendants as having accepted the work and derived benefit from it. This would *prima facie* entitle the plaintiffs to recompense; but, when connected with the fact that they had agreed to do the work, for which they were to be paid after estimates by an Engineer; that they had received pay for all the estimates made, but had, without cause, abandoned the work and refused to perform services further, thus throwing its execution upon the defendants; that this was the bed for a railroad, demanding instant despatch and not admitting of delay, and that an absolute necessity existed for the use and appropriation of their work, as in no otherwise could the road be made, the case is essentially altered. Not en-

titled by their own act, through deficiencies in their work, to compensation, by what rule or principle are they entitled to it when others perform the work? A rule fraught with consequences so pernicious can scarcely receive the sanction of the Court. The work on the road may differ from that of the cross ties, not estimated because at too great distance from the road or other cause, and which were appropriated by defendants, if there be such, very clearly for them a compensation should be awarded.

A plea in abatement was filed by defendants, that "the Court should not take further cognizance of the action, because they say that the cause of action in the declaration originated under a written contract, wherein and whereby it is expressly agreed and understood between the parties that the Chief Engineer of the Florida Railroad Company should in all cases decide every question which might or could arise under said contract and his decision should be final and conclusive," &c. The Court held this plea to be bad, and, we think, rightly. If available to the defendants to the extent contended for, it would be in bar, showing that there was no cause of action. This is technically a plea to the jurisdiction of the Court. In such a plea "defendants must show that another Court has exclusive jurisdiction of the cause of action."—Archb. Pl., &c., 280. "Whenever the subject matter of the plea or defence is that the plaintiff cannot maintain any action at any time in respect to the supposed cause of action, it may and usually should be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement."—1 Chitty Pl., 434. The effect of such an agreement has been discussed in the English Courts, where a difference as to its legal effect seems to prevail. It is, perhaps, not important on this occasion finally to deter-

mine the matter. Undoubtedly, like other parts of a contract, this should be faithfully observed, carried out and executed. In this case, reference should have been made to the Chief Engineer to arrange the difficulty. A provision of the kind exists, and is becoming common in nearly all government contracts, in nearly all public works and private ones of large extent. Indeed, it would seem indispensable to their proper and right execution. To say that the provision is useless and of no avail, and that either party may disregard it and apply to the Courts for any injury, would be doing great violence and wrong to a solemn agreement of the parties and to great public interests. Nor will it be proper to say, that in no case is either party entitled to redress from the Courts. For the present, we content ourselves with deciding that the present suit may not be maintained, except as hereinafter stated, and by referring to the adjudications on the subject, leaving future cases to be determined as the nature of the case may require.

“Where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the Company’s Engineer, or any particular party, and provides that his decision shall be final, no relief from his decision can ordinarily be obtained even in a Court of Equity, unless upon the ground of partiality or obvious mistake.”—Redfield on Railways, 207.

“When, by the terms of a railway construction contract, executed under the seals of the parties, the work is to be paid for from time to time, upon the estimate and approval of the Company’s principal Engineer, and the amount and quality of the work finally to be determined in the same way, no action at law or in equity can be maintained

until such estimate and approval is obtained, unless it is prevented by the fault of the Company. But, when no such Engineer is furnished by the Company, or when, through their connivance, he neglects to act, the contractor is not without remedy in equity.”—Redfield, 221.

The case of Herrick vs. Vermont Central Railroad Company is in confirmation of this view. It is there held that “a stipulation that the Engineer shall be sole judge of the quantity and quality of the work, and from his decision there shall be no appeal, is binding upon the parties and constitutes the Engineer and umpire or arbitrator between them.”

“Such a stipulation imposes upon the party by whom the Engineers are to be employed the duty of employing competent, upright and trustworthy persons,” &c.

“If payment for the work performed is dependent upon and to be made according to the Engineer’s estimate as to its amount, and the employing party performs his duty in reference to the employment of suitable Engineers, &c., the obligation to pay will not arise until such estimates are made.” “But if no estimates are made, then the neglect or fault of the Engineer, or of the party who employs him, the other party probably could recover at law for the work performed by him without any Engineer’s estimates for it.”

“A Court of Equity has jurisdiction of a claim to be paid for a larger amount of work done under such a contract than was estimated by the Engineer, where the under-estimate was occasioned either by mistake or fraud.”—27 Vermont Reports, 673.

The learned author just quoted, alluding to difference of opinion in the House of Lords as to a covenant of this kind, makes these sensible remarks:

“A stipulation that the liability under a contract shall

not accrue except upon the basis of certain previously ascertained facts, is no more than a limitation upon the right of action, as that no action shall be brought until after one year, or unless commenced within five months, which have been held valid. Hence a contract to purchase goods, at the valuation of N and M, cannot be made the foundation of an action without obtaining the valuation stipulated or showing that the other party hindered it; and, in some cases it is held, that if the estimate is withheld or defeated by the fraud of the other party, no action at law will lie—the only remedy by special action on the fraud or in equity, perhaps. We therefore feel compelled to adopt the view, that upon principle, on fair balance of authority, such a stipulation in regard to estimating labor or damages under a contract for construction is valid and may be treated as a condition precedent, but beyond that the present inclination of the English Courts is to hold it repugnant to policy," &c.

"But the balance of authority in this country seems to be in favor of allowing such a condition precedent in this class of contracts to extend to the quality of the work as well as the quantity, and to the question whether the work is proceeding with sufficient rapidity, and whether the Company, on that account, are justified in putting an end to the contract."—Redfield, 224.

We hold, then, as well by the general principles of law as those applicable to this particular class of cases, that the plaintiff has not shown a right to recover; that he has not performed his contract and has not shown such prevention or obstruction by defendants as to entitle the Court to treat it as performed.

The judgment of the Circuit Court will be therefore reversed and set aside, and the case be remanded for a new trial and further proceedings to be had not consistent with this opinion.

NELSON STAPLES, PLAINTIFF IN ERROR, VS. T. HARTRIDGE  
& Co., DEFENDANT IN ERROR.

This was an action of assumpsit, brought by the plaintiff in error against the defendant in error in the Circuit Court of Duval county. The bill of exceptions, signed by the Judge, states that the jury rendered a verdict in favor of plaintiff for \$672.01<sup>1</sup>; that on the day following the said verdict the defendant's counsel entered a motion for a new trial upon the following grounds, to-wit:

1st. That the verdict is contrary to evidence and the weight of evidence.

2d. That the ruling of the Court was contrary to law.

3d. That the defendant was taken by surprise.

4th. On the ground of newly discovered evidence.

Whereupon, and before the defendant's counsel proceeded with his argument, the Court announced to him that it had made no ruling on the point, and, the counsel not pressing the other points, the motion for a new trial was denied; that on the 27th day of October, A. D., 1858, another motion for reconsideration of the said motion for a new trial was argued, which second motion was entered upon the motion docket on the 26th day of October, A. D. 1858, and in support of said motion the said counsel for the defendant filed an affidavit, setting forth the grounds of said motion.

The counsel of the plaintiff objected to the said motion:

1st. That he had no notice of said motion.

2d. That the ground of this motion had already been adjudicated by the denial of a new trial under the first motion, and for other reasons, to-wit: That the defendant's counsel having abandoned his defence on the trial and

consented to a verdict, he could not be entitled to another trial.

The Court upon the hearing of said motion, granted a new trial upon the said affidavit of defendant's counsel alone.

To which order of the Court, allowing and granting a new trial in said cause, the counsel for plaintiff then and there excepted and prayed the Court to seal his bill of exceptions, which was done accordingly.

The law of this State, entitled "an act in addition to and amendatory of the several acts concerning writs of error and appeals to the Supreme Court," approved January 7, 1853, (Pamphlet Laws 1852-'3, page 100,) in the first section provides:

"That from and after the passage of this act, all orders and judgments of the Circuit Courts of this State, made and passed in any cause therein, wherein the said Courts shall allow and grant, or shall refuse to allow and grant any motion for new trial, or any motion to amend the pleadings, or to file new or additional pleadings, or to amend the record of any cause during the term of the Court in which it was determined, or shall refuse to allow and grant a motion for continuance of the cause, shall and may be assigned for matter and cause of error, upon any writ of error sued out or appeal taken to the Supreme Court, and the said Supreme Court shall hear and determine the matter so assigned for error, in the same manner and under like rules and regulations as in other cases."

The second section provides:

"That in all cases enumerated in the preceding section of this act, the party aggrieved by any such order or judgment, shall make his exception thereto in writing, and shall insert therein all such evidence, affidavits, amendment of pleadings, and all other matters which do not pro-

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Staples vs. Hartridge & Co.—Argument of Counsel.

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perly appear of record, which were considered by the Court below, or which were offered to the consideration of the Court below, and should have been considered in the making and passing said order and judgment, and the said exception shall be tendered to the Judge of the Circuit Court for his signature, in the same manner and under the same rules, regulations and provisions as bills of exception are now by law made up, signed and made part of the record."

The third section provides:

"And whereas, the construction which has been given to the law regulating appeals in cases in equity, whereby appeals are refused after the merits of the cause have been passed upon, because of some reference for account, or some other matter, is productive of unnecessary delay and inconvenience, and sometimes of useless expense in taking the accounts, because of the reversal of the decree ascertaining the rights of the parties litigant:

*Be it therefore enacted*, That appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the Circuit Courts of this State, when sitting as Courts of Equity: *Provided always, however*, That such appeal shall not operate as a supersedeas, unless the Judge of the Circuit Court, or a Justice of the Supreme Court, on inspection of the record, shall think fit to order and direct a stay of proceedings: *And provided further*, That no appeal so allowed shall operate as a supersedeas, except on the conditions now prescribed by law in case of appeals from final judgments and decrees."

*Philip Fraser* for plaintiff in error:

The Supreme Court of this State is a creature of the Constitution. Its jurisdiction is merely appellate.—Const., art. 5, sec. 2.

The appellate jurisdiction of this Court is to be exercised according to the regulations in the manner and at the time prescribed by the Legislature.

The act of July 25th, 1845, adopts the acts of the Legislative Council of the Territory, then in force, regulating appeals and writs of error, and makes them applicable to the Supreme Court.—Thompson's Digest, 51.

By the act of February 10th, 1832, sec. 1, it is provided that the party aggrieved may appeal from any *final* sentence, judgment or decree of the Circuit Courts to the Supreme Court. Writs of error were required to issue as a matter of right, and on demand, from the office of the Clerk of the Supreme Court or from the Clerk of the Court in which *such* judgment had been rendered, that it is a *final* judgment.—Thompson's Digest, pp. 446-'7.

By the act of February 17th, 1833, a party aggrieved by a rule of Court, or other summary order, which is in effect a *judgment* for the payment of money or other thing, may have an appeal, writ of error or *certiorari*.—Thompson's Dig., p. 448.

By the 5th section of the acts of February 10th, 1832, it is made the duty of the Judges of the Supreme Court, on an appeal or writ of error, to examine the record, to reverse or affirm the judgment of the Court below, to award *a new trial* in the Court below, or to give such judgment, sentence or decree as the Court below ought to have given, or as to them may appear according to law. These are the powers incident to the Court as the law stood previous to the act of 1853. Under this law, the Court had no power to revise the proceedings of the Court below, either at law or in Chancery, until after a final judgment, sentence or decree.—Thompson's Digest, 449.

At common law, appeals from Courts of Equity might be brought upon any interlocutory matter, but at law, a

writ of error could be brought upon nothing but only a definitive judgment.—2 Black, Com., 46.

In this respect our law differs from the common law, because under our statute, appeals and writs of error in law and chancery causes were put upon the same basis, and would not lie until after a *final* judgment, *sentence* or *decree*.

It becomes us, then, to enquire whether the Legislature, by the act approved January 7th, 1853, intended to change or alter the law as it stood before, and, if so, in what respect the law has been altered, amended, restricted or enlarged in its operations by that act, and we must draw the intention of the Legislature from the language and provisions of the act itself, so far as this can be done. It is humbly conceived that the Legislature intended to extend the remedy by appeal and writ of error to a new class of cases not provided for by the old law. The old law provided for appeals and writs of error from *final* judgments and decrees. The new law provides for appeals and writs of error from different kind of judgments, viz: "All orders and judgments of the Circuit Courts of this State, made and passed in any cause therein"—*not final judgments*, but judgments wherein the said Courts shall allow and grant, or shall refuse to allow and grant, any motion for a new trial or any motion to amend the pleadings, or to file new or additional pleadings, or to amend the record of any cause during the term of the Court at which it was determined, or shall refuse to allow and grant a motion for the continuance of the cause—the orders and judgments of the Court upon these *motions*, and not a final judgment upon the merits, *may be assigned for matter and cause of error* upon any writ of error sued out or appeal taken to the Supreme Court, and the said Supreme Court shall hear and determine the matter so assigned for error—that is, the or-

ders and judgments upon these motions in the same manner and under the like rules and regulations as in other cases—that is, as in cases of writs of error and appeals from final judgments, for those are the only *other cases* known to the law.—Pamphlet Laws 1852-'3, page 100.

By the second section of the act of 1853, it is enacted, that in all cases enumerated in the preceding section of this act, the party aggrieved by any *such* order or judgment—not final order or judgment, but such order or judgment made upon those motions—shall make his exception thereto in writing, and shall insert therein all such evidence, affidavits, amendments or pleadings and all other matters, which do not properly appear of record, which were considered by the Court below, or which were offered to the consideration of the Court below and should have been considered in (what?—the progress of the trial upon the merits? No. In making up of the final judgment in the cause? No. What then?) “the making and passing said order and judgment.” “And the said exception shall be tendered to the Judge of the Circuit Court for his signature in the same manner and under the same rules, regulations and provisions as bills of exception are now by law made up, signed and made part of the record.”

The first section of the act of 1853 enumerates the particular orders and judgments upon which appeals and writs of error may be brought. The second section prescribes the manner and rules under which they shall be brought. When such orders and judgments have been made and passed, the remedy given by the Legislature is applicable. But has the Legislature appointed and fixed by the act any *time* when the party aggrieved may have the benefit of that remedy? So far as we can learn from the act itself, he is not postponed to a final judgment on

the merits. The bill of exceptions is to be tendered at once upon the making and passing of such orders and judgments. It is to contain such matter only as was considered, or ought to have been considered, upon the hearing of such motions in making and passing such orders and judgments, and not such matters as would arise in the course of a trial upon the merits, or as would be considered in making up and entering a final judgment.

From these considerations, it is evident that the Legislature intended that the remedy should be immediate. It is humbly conceived, that by the different modes of expression used in the first and third sections of the act of 1853, the Legislature meant nothing more than simply to provide, that at law appeals and writs of error could only be taken upon such orders and judgments as are made and passed upon the motions enumerated and specified in the first section of the act, whereas the parties in equity shall have a fuller and more extensive remedy, not limited to specified and enumerated orders and decisions, but applicable to *any* and all interlocutory orders, decisions, *judgments* or decrees. In other words, appeals may be taken from all interlocutory orders and judgments of the Court in equity, but only from these enumerated in the act at law, according to the rule that the mention or enumeration of particular matters excludes those matters not mentioned. That is, "when the law descends to particulars, such more special provisions must be understood as exceptions to any *general rules* laid down to the contrary, and the *general rules must not be alleged* in confutation of the special provisions."—Dwarris on St., 765; 5 Bing, 180. 492-'3.

The act thus far, then, can have no reference whatever to the *time* when appeals and writs of error shall be taken except so far as this, that the remedy is given as soon as

the *matter* arises which is made a cause of appeal by the act. The fourth section of the act seems fully to sustain this view. It is enacted by that section, "that this act shall not be construed so as to deprive either party from deferring and postponing the entry of his, her or their appeal until after the entry of the final decree *or end of the cause, as now prescribed by law*, nor shall such postponement of the appeal be decreed, held or taken as an acquiescence in the propriety of any interlocutory order or decree made in the progress of the cause, or any waiver of any error therein."

By this section, the Legislature evidently intended to leave it at the option of the party aggrieved to take his appeal instant, when the order or decree complained of is made by the Court, or to wait till after a final decree or judgment in the cause, and provides that his delay till final judgment should not be taken as an acquiescence or waiver of any error in any interlocutory order or decree made in the progress of the cause. This section clearly embraces every case where an appeal is given by the act. If not, by what clause does it exclude any? It is clearly intended to include appeals at law as well as in equity, else, why designated a "*final decree or end of the cause?*" The Legislature certainly meant something more by the words "*end of the cause*" than a final decree in equity, and what other meaning can attach to those words than final judgment? It is as if the Legislature had said, "the party aggrieved shall not be deprived of the remedy given by this act though he may postpone his appeal until after a final judgment or decree." In order to fortify all the avenues of justice and to secure the party his remedy beyond all cavil, the Legislature goes still further and says, that such postponement shall not be held, decreed or taken as an acquiescence in the propriety of *any* interlocutory *order* or

decree or *any* waiver of any *error therein*. Now, are we to say that this does not apply to all *orders* from which an appeal is given by this act, and that the words "order or decree" mean the same thing, and that therefore this section of the act refers to orders and decrees in equity alone? If so, then by the application of the proper rules of construction, the privilege of waiting until a final decree or the end of a cause before appeal is granted by this section to *parties in equity only*, and parties at *law* must take their appeals before final judgment or they acquiesce and waive their right of appeal from those orders enumerated in the first section of the act, where the order complained of is made before final judgment. That is, if a postponement is provided for equity causes alone, it is allowable in no other. Besides, if such a construction should be given to the act as that no appeal shall lie at law until after final judgment, then, in cases of arrest of judgment, there being no final judgment, the statute would be nugatory—the party would have no remedy.—2 Chitty Pr., 593.

The argument *ab inconvenienti* will apply to both sides of this question; for, if justice should be delayed by these appeals in some cases, it will be delayed by postponing them in others, as will be evident in this case. The hearing of this appeal will delay neither party, but a refusal to hear it still after final judgment will delay the plaintiff indefinitely.

The question, then, is, what is the intention of the act? If it is deducible from the act itself, that the Legislature intended to give appeals before final judgment or decree or the end of the cause, then is this appeal well taken.

*L. I. Fleming* for defendant in error.

The Supreme Court, after argument, dismissed the appeal, on the ground that the Court has no jurisdiction of

an appeal or writ of error taken in a cause at law before final judgment.

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HANCOCK, ADMINISTRATOR, APPELLANT, VS. TUCKER, ADMINISTRATOR, APPELLEE.

1. The rule that on discovery of a fraud in a contract, the defendant should abandon and avoid claiming benefit by it; and, in case of a sale of goods, on discovery of unsoundness, that a return should be made by the vendee, is undoubted and indisputable, but not applicable to cases of sale of property of no value and when the subject purchased is not rightly an article of sale or of merchandise.
2. A new trial will not be granted, in case of conflicting testimony, when the weight of the evidence agrees with the verdict.

This case was decided at Tampa.

Appeal from the Circuit Court of Hillsborough county.

The opinion of the Court contains a statement of the facts in the case, to which reference is made.

*Magbee* and *Hart* for appellants.

*Gettis & Mitchell* for appellee.

BALTZELL, C. J., delivered the opinion of the court.

This is a suit instituted upon two promissory notes given for the purchase of a negro man slave. The defence was,  
1st. That Hancock, who made the purchase, was induced to enter into and make the said promises through and by means of the fraud, covin and misrepresentation of the said Tucker and others in collusion with him.

2d. That the notes were given for a negro man named Gadsden, and that, at the time of the sale, the vendor

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fraudulently represented to the vendee that the said Gadsden was an able-bodied man, when, in fact, the said negro was then unsound, having a disease called dropsy, and was of *no value*.

The plaintiff replied, admitting the notes to have been given for Gadsden, but denied that Tucker represented to Hancock that Gadsden was an able-bodied man, or that he represented him sound, and avers that Hancock knew as much about the soundness of the negro as Tucker did, and that there was no objection to the unsoundness until defendant was pressed for payment of the notes.

The jury found for defendant under instructions given, and the plaintiff has appealed to this Court, alleging error in refusing to give instructions asked by plaintiff, in the admission and exclusion of questions proposed to witnesses and in not granting a motion for a new trial.

The evidence in the case was substantially as follows:

Tucker bought the negro from George Stafford; had him four or five days before he sold him to Hancock. Stafford sold the boy Gadsden to Tucker in the fall of the year, (September,) for \$725.

Hearn, a witness for defence, swears that he resided in Hernando county, 4 or 5 miles from George Stafford's residence; was at Stafford's house on several occasions, and the negro was sick every time he was there; appeared to be diseased and was swelling very much; saw Stafford prick him on the back of his head and water proceeded from him; his hands and all his body were puffed up; the water appeared to be clear; he was sick and unable to do work for some time, about a month or more, in the fall of 1853; appeared to be less restless; had to be propped up and made a good deal of fuss; Stafford resided 10 or 12 miles from Tucker's place; never saw the negro at work at Staf-

ford's after his sickness; saw him stirring about the yard; saw him after his sickness walking about the yard.

Dr. Todd, a practising physician, says he prescribed for a sick negro of Stafford's for dropsy some years since; it was during the year of the yellow fever, but before the fever occurred—in the fall and winter of 1853; he prescribed for him, but did not visit him; did not see him; can't say he ever saw him or not; the negro could not freely lay down from shortness of breath; Tucker and witness were friendly; did not tell Stafford he would injure Tucker if he could; told nobody so; was friendly with Tucker to the time of his death.

John Gallagher first saw Gadsden in 1845; whether in '53 or '54 can't say; knew him in 1844; rode up to Hancock's place and saw him leaning against a tree with his arms between his head and the tree, 15 or 20 steps from witness; don't know whether he was swollen at the time; he was in a bad condition; could hardly talk; looked sick; his eyes were sunken as if in the gasp of death; he could hardly speak; Mr. Hancock owned the negro driving the cart to Tampa.

Dr. Branch, a practising physician, having heard the testimony of Hearn and others, says that the boy had dropsy—general dropsy. It arises from many organic diseases, which may be of very long standing, and, in his opinion, this was one of that kind. It may be temporarily removed, if of that kind, and, if the cause be not removed, it is death to return which did happen in this case, according to the evidence which he heard. This disease had arrived at a very critical stage when the negro was in Stafford's possession, and he must have died if relief had not been given. The dropsy can be removed for a short time and the cause still remain in the system. It may be temporarily removed and the cause continued. The negro, in

his situation, was not an able-bodied man, provided the cause be from an organic derangement or disease. It was his opinion, from the testimony, the dropsy was occasioned by an aggrieved disease. He could conceive no other cause, from the description given. Swelling might be produced by the combined influence of cold and mercury, but the attendant symptoms of breathing, restlessness, as shown by the testimony in this case, could not be present. In case of mercury and cold producing a swelling of the body with asthma, he would have difficulty of breathing, restlessness in a recumbent or any other position. His opinion is, that the negro had general dropsy. If of eleven years standing, was incurable.

John Gallagher recalled: Says he thinks it was in the fall of 1845 he was first acquainted with the boy; he was sick that fall; I saw him in a very swollen condition, he appeared to me to be swollen all over; can't say whether he had a difficulty in breathing; did not examine him at that time; the boy was able to go about not to work, then; hits continued between 11 and 12 months after I saw him; the negro was in possession of Mr. Frierson at that time, Taylor Frierson, of Alachua county, in this State; I saw him at Locklosa Creek; I saw him on the plantation after he was sick, but not there after he was sick; Peter Platt was present when Gadsden was sold by Tucker to Hancock; Mr. Tucker proposed to sell to me; asked why he didn't buy; think he was worth the price, and why he thought so; said he judged the boy by the looks of him; he heard the conversation between Tucker and Hancock; Tucker said he was a strong able-bodied boy and had split 250 or 300 rails a day, and he could do it again, just give him enough to eat.

Silas McLelland saw the boy in possession of Hancock; when first seen, he was walking about the yard, making a

little noise, appearing to be sick; a short time afterwards was at Hancock's again; the boy appeared to be very much swollen and in a good deal of pain; about three weeks between time of first seeing him; was about Mr. Hancock's frequently in the fall, as well as he recollects.

Mr. Sparkman says: In the spring of 1854 a cart was drove up to my house with a negro in it; Mr. Hancock's boy was driving the cart.

Mr. Roberts, a physician formerly practising in Alabama and Georgia, says he saw Mr. Hancock's boy driving a cart with a negro in it; a mere look indicated that the boy was dropsical. This physician has practiced in this State, but without charge.

This was the testimony on the part of plaintiff.

On part of defendant, William Stafford said that Hearn told him he would injure Tucker if he could; this was in 1852 or '53; I am friendly to Mr. Hearn; had no difficulty with him; people say that Mr. George Stafford is my uncle; Hearn is said to be my brother-in-law.

Mr. McCarty says: He knew the boy Gadsden, sold by him to George Stafford; he was not in possession of Taylor Frierson in '44 or '45 to my knowledge; William Stafford knew the boy Gadsden, owned by George Stafford; he had him in 1852; does not know who George Stafford sold him to; had him in 1853 to the best of his belief; witness worked with the boy in the spring and summer of 1853; didn't see any difference in his work and mine; he, witness, was an able-bodied man at that time; the boy done as much work as I did, or any other negroes I ever saw work; never saw him split rails; has lifted and rolled logs with him; he could lift as much as witness could; the negro was sick once; appeared very sick; was well as anybody else afterwards; George Stafford sold the negro to

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William Tucker in September, 1853; he did the work of an able-bodied man all the spring and summer of 1853; was sick in the fall of 1852; gave him calomel, but can't say that he took cold; was sick for a month or six weeks in the fall of 1852; did the work of an able-bodied man, after he recovered from the sickness, up to the time I sold him; have seen him split rails; he could split 250 rails a day, and do it before night; I sold him because he would run away from me; Capt. Kendrick offered me what I gave for the negro, but the terms did not suit.

Dr. Kendrick, a practising physician, was present when Stafford sold the negro to Tucker, about the 1st Sept., 1853; was witness to a bill of sale; Tucker asked Hancock \$1,000 for the boy; from the time Tucker had the negro from Stafford 7 or 8 days elapsed till he sold him to Hancock; the sale of him (Tucker to Hancock) was 21st Sept., 1853; from Stafford to Tucker, between 10th and 15th September, 1853; I traveled with Tucker, and the boy from Fort Dade to Hancock's, distance 30 or 35 miles; Tucker and myself went in a buggy, the boy on foot; took us a part of the day; the boy stood the journey remarkably well: didn't hear Tucker say one word about the health or unsoundness of the boy; Hancock tried him one day, or part of a day; was acquainted with the boy in the spring of 1853, and, so far as witness knows, he is an able-bodied man; is positive that the boy did not have dropsy, nor any symptoms of dropsy, at the time of the sale to Hancock. Cross examined—Thinks Tucker owned the boy some 7 or 8 days.

James D. Green says, that in a short time after Hancock bought the negro he saw him splitting rails about six miles from Tampa, and saw him working in a field near Hancock's house.

Dr. Benton states, that Hancock applied to him for

medicine for his boy, sick with the dropsy, and witness told him he could not go to his house to attend said boy, and that in April, 1854, a boy came to his house with a negro in the cart, and that he was then dead; and he examined the corpse, and from that examination became of the opinion the boy died of the dropsy, but can't say that it was the boy Hancock bought of Tucker.

This was the testimony in the case from the record.

The instructions required the jury to ascertain whether there was a false representation of material importance in the sale of the negro, conducing to it and to the injury of defendant, or that there was fraud in the making it. In case of their finding either of them, then the further enquiry was whether there was a return of the property after discovery of such fraud or misrepresentation. If not, and he was kept by defendant, then plaintiff was entitled to its actual value, as established by the evidence. The jury having found for defendant, the fair and just conclusion from their verdict is that there was fraud or misrepresentation and that the negro was not of value. Nor do we think that he has right to complain of the instructions. They seem to be appropriate to the case, to embrace it in all its parts and as favorable to plaintiff as he could have asked or expected; for, laying out of view the more severe aspect of the case, that of fraud, and assuming that there was misrepresentation to the injury of defendant to some extent, on principles obvious to the most common mind, there should be an abatement of the price to this extent. A price paid through misrepresentation is not and should not be the true price to be adjudged by a Court. What, then, should and ought to be the true price? Most obviously the actual value, as established by proof divested of its misrepresentation. That is the value that has been fixed, estimated and allowed by the jury in the present

case. The testimony on the subject, it must be admitted, is varied and contradictory, just such as is properly referable to a jury of the vicinage, acquainted with the parties and the witnesses, to reconcile their statements, or, if this may not be done, to ascertain the truth by giving proper allowance and regard to that which is of worth and rejecting that entitled to no estimation. There is no reason, so far as we can see, to doubt or call in question the accuracy of their decision. The preponderance of the proof, in our opinion, is clearly on the side of defendant and with the verdict of the jury, and we cannot arrive at the conclusion that it was against the law or the evidence. Whilst such is the conviction of our own minds, the enquiry yet is as to the law of the case, and whether this ruling of it is supported by the authorities. The only difficulty arises from the fact that the property was not returned, but kept by the defendant after discovery of the defect, in reference to which the rule is: "On discovery of the fraud, the defendant ought to abandon the contract and avoid claiming any partial benefit from it, and in his plea ought to make an allegation to that effect, and that the defendant had notice thereof."—2 Sand. Pl. and Evidence, part 1st, pp. 61-'5, Am. ed'n.

"Where goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, or give notice to take them back, and thereby rescind the contract, or he will be presumed to acquiesce in the quality of the goods." 2 Kent's Com., 480.

No doubt this is founded in the best sense and highest reason, conducing to the maintainance of contracts, their proper observance and due execution—not rightly should there be a deviation or departure by the Courts in the respect due to it. A man may be entitled, by his bargain, to

property of a peculiar kind, of a particular quality or figure, and, not obtaining these, he should, on discovery of the defect, at once and without delay make return. He may not keep the article and refuse the price; for, if returned, the vendor might sell to others having occasion for just such an article. But, suppose the property itself be of no use nor value, either to the vendor or vendee, and be not rightly an article of merchandise or of sale, as in the obvious case of decayed or diseased provisions, or other worthless property, the reason of the rule ceasing the rule itself ceases. A return here would seem not to be required by any rule of right, reason or legal exaction.

We regret that we have not time to pursue this subject through the various adjudications of the Courts, so as to extract from them such just and rightful conclusions as might be obtained after elaborate investigation. As it is, we neither have the time in which to make the examination, nor, if we had, have we the books to refer to. We think the adjudications of the English and American Courts will be found to support the view we have taken of the subject.—2 Greenleaf Evi., p. 136, No. 4, 6th ed'n, referring to Benton vs. Stewart; 3 Wendell, 236, Van Eppes vs. Harrison; 5th Hill, 64, Thornton vs. Wynn; 12 Wh., 183, Case vs. John; 10 Watts, 107, McAlister vs. Reab; 4th Wendell, 483; 8th Wendell, 109, Steel vs. Hall; 20th Wendell, 51; 3 Hill, 172; 1 Livy & Rauls, 477.

The decision of the Supreme Court of the United States in the well-considered case of Withers vs. Green, 9 Howard, 220, given in full in 8 Florida, 86, would seem in its reasoning and language to have a direct application to the subject before us. The Court say: "Turning to a class of cases founded on what has been denominated a failure of consideration, although involving bad faith, breach of warranty, false and deceitful warranties, false misrepresenta-

tion in the procuring of contracts, such as might in particular aspects extend to the entire rescission of contracts, it will be seen that the Supreme Court of Alabama have, in the construction of their statute, ruled that a defence founded on either or on all of the facts here enumerated shall be admissible in mitigation of damages; and in allowing this mode of defence, which seems to fall more strictly within the import of the terms set-offs and discounts than objections aimed at the total abrogation of contracts can do, the Courts of Alabama have acted in accordance with those of other States in construing statutes similar to their own—consistently, too, with the principles of reason and justice adopted by modern tribunals when acting apart from statutory provisions,” &c. “Upon authority, both in point of respectability and numbers, it is clearly provable that where fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages.” Proceeding still further, the Court quotes the case of *Kings vs. Boston*, “where the plaintiff sold a horse for 12 guineas, three of which were paid and the property warranted sound. It was proved that the horse, at the time of the sale, was worth not so much as had been paid, and the Court non-suited plaintiff.” As a conclusion on the whole subject, the Court say: “But, however, the rule laid down by the Courts in England should be understood. It has been repeatedly decided by learned and able Judges in our country, when acting, too, not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise

all or any of these facts may be relied on in defence by a party when sued upon such contract, and that he shall not be driven to assert them, either for protection or as a ground for compensation in a cross action." In this case, suit was upon a note of hand of \$3000, given for two fillies represented sound and of high pedigree, and purchased for their blood and for the turf. The defence was unsoundness and falsehood as to the pedigree, without any return of them, but an excuse for the failure. In reference to this state of case, the Court say: "If the purchaser choose to retain the property and either to sue upon the warranty of pedigree and soundness or to defend himself upon the ground of difference between the true and pretended value of the property, he was bound neither to give immediate notice nor to tender a return of the property. He would be permitted to discount the difference between the real and simulated value."—9 Howard Sup. Court Repts., 220.

This would seem to be an authority expressly in point to the case before us; for, by the decision of the Court, the true value of the fillies was adjudicated, the measure of the plaintiff's rights, not the price induced by misrepresentation. Here the value, as found by the jury upon the true state of the case, has been fixed as the true sum. If they had allowed a hire or some small sum for the use, we should not have considered it objectionable. As it is, they must have been satisfied. The boy was of no value, and we see no cause to differ with them. We do not deem it necessary to discuss at any length the error assigned as to the refusal of the Court to give the instruction asked by plaintiff; this has been sufficiently treated in our views as to the instructions given. Nor do we think it proper to examine the objections to questions proposed to witnesses at almost every question asked or rejected by the Court. It would but extend the opinion to an extraordinary length

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without any compensating benefit or advantage. There is no question of principle or matter of importance in any of them affecting the true merits of the case. The objection made to an unlicensed physician as a witness may be regarded rather as harmless and not conducing to any injurious result of the whole case.

We are of opinion that the judgment of the Circuit Court is right and should be affirmed.

DUPONT, J., dissenting.

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JOHN WATSON, PLAINTIFF IN ERROR, VS. SEAT & CRAWFORD, DEFENDANTS IN ERROR.

A defendant against whom a default has been taken for want of a plea is not absolutely out of Court, but still retains the right to appear upon an inquiry of damages, to cross-examine the plaintiff's witnesses, to introduce evidence in mitigation of damages and to address the jury thereupon.

This case was decided at Tampa.

Appeal from the Circuit Court of Hillsborough county.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

*S. St. George Rogers* for appellant.

*Gettis, Magbee* and *Hart* for appellees.

PEARSON, J., delivered the opinion of the Court.

This was an action of trespass, brought by the defendants in error against the plaintiff in error for the seizure and taking of a quantity of lumber and timber at their

saw-mill, near Tampa, and comes up by writ of error from the Circuit Court of Hillsborough county. It appears from the record, that the declaration was filed to the fall term of 1855. There was at that time an appearance filed for the defendant below. A default for want of a plea was taken at the spring term of 1856, which, upon motion, was opened and the defendant granted further time to plead until the 1st of July succeeding.

At the fall term of 1856, the parties appearing by their counsel, another default, as before, for want of a plea was taken, on motion of plaintiff's counsel, and a writ of enquiry awarded. The defendant then claimed the right to be heard upon the enquiry as to the amount of damages, to cross-interrogate witnesses and to argue the case before the jury, which motion was denied by the Court, and it was ruled, "that defendant is out of Court by reason of his default, and cannot be further heard in the cause." To which ruling the defendant's counsel then and there excepted, and thereupon brings his writ of error. The single question here presented is in regard to the correctness of the ruling of the Court below in reference to the defendant's right after default to be heard upon the execution of a writ of enquiry as to the amount of damages sustained. The universal practice of our Circuit Courts has been, so far as we know, contrary to the rule laid down by the Court below in this case, and this point of practice does not appear to have been heretofore made before this Court for the reason, perhaps, that the rule prevailing in the Circuit Court has been so generally acquiesced in, and we think such practice consonant with reason, justice and law. The rule in chancery is, that whatsoever is well pleaded in the bill and not denied in the answer is taken and admitted. This rule, with a change of terms only, it may be

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said, obtains at law. A defendant appearing and failing to plead admits the cause of action, as stated in the plaintiff's declaration, and the plaintiff's right to recover thereupon, but nothing more. Our statute (see *Thomp.'s Dig.*, p. 347, chap. 5, sec. 1.) enacts, that in such cases, provided the action be upon a liquidated demand, the Court may direct the Clerk to assess the damages; but, when it is necessary that testimony should be adduced to ascertain and fix the amount of damages, a writ of enquiry shall be awarded. This being a case sounding in damages, the writ was properly awarded in accordance with the provision of the statute. In this state of the case, the defendant cannot be said to be absolutely out of Court. He is necessarily still before the Court, and may, of course, contest all matters attending his rights not concluded by his default. When he is summoned to plead to the action, he stands mute, and thereby confesses the plaintiff's cause of action and right of recovery; but when a motion is made to assess the amount of the plaintiff's damages, he replies and claims the right to contest that question. An ingenious and very clear illustration of this distinction was well put in the argument at bar. The case was supposed of a lessee for a year of a close, containing a valuable and productive orchard of fruit trees, bringing the action of trespass against his landlord; the landlord suffering a default whereby he admits the trespass; upon the enquiry of damages offers to prove title to the close in himself, so that, if the orchard had been destroyed by the trespass the plaintiff's damages would be reduced from the whole amount of injury to the free-hold to the separate and single value of the plaintiff's interest in his unexpired term. And yet this matter, though unquestionably admissible in mitigation of damages, would not, if pleaded, have been a bar to the action. The authorities go to the fact that whatever would have

been a bar to the action itself cannot be given in evidence in mitigation of damages; and these decisions would seem by implication to concede that such matters as were not in bar might be adduced in mitigation.—10 Wendell, 378; 3 Gill & Johnson, 247; Tidd's Practice, 580. Such has long been the English law on the subject.—See 3 Chitty's Gen. Prac., 673; Tidd's Prac, 580-'1.

The whole doctrine is so fully laid down in Archbold's Practice, 2 vol., p. 25, that it seems needless to go further than cite his valuable work. He says, that the plaintiff's counsel is bound to give notice to the opposite party of the execution of a writ of enquiry at the peril of losing his costs, and further, that "*all the plaintiff has to prove or the defendant is permitted to controvert is the amount of damages.*" Thus it seems that the practice of the common law Courts is well settled on this question. It is one of frequent occurrence and much importance with us, and we trust that this decision may have the effect of rendering definite and uniform the practice of our Circuit Courts in this respect. The several cases cited in argument from the reports of our own Court relate to the effect of abstract instruction, not calculated to mislead the jury, and to the manner in which the subject matter of exception should be made a part of the record, to which we are confined in our review of the case by the bill of exception, and do not, as it appears to us, touch the question under consideration. Nor do we consider it possible for the appellant, after the Judge below ruled him out of Court and decided that he had no right to appear for any purpose, upon the execution of the writ of enquiry, to have supervised that proceeding and excepted at each successive stage of it. His writ of error is founded upon the denial of his right, and he cannot be prejudiced for failing to exercise the very privilege which the Court had refused to allow him

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Parker and others vs. Hendry, Adm'r.—Opinion of Court.

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and which by his writ of error here he seeks to obtain. It a like course had been or even adopted in the case of an ordinary trial, the objection would apply with equal force.

Let the judgment be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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HENRY L. PARKER, JOHN H. HOLLINGSWORTH, WILLIAM B. HOOKER AND JOHN PARKER, APPELLANTS, VS. FRANCIS A. HENDRY, ADMINISTRATOR *de bonis non* OF THE ESTATE OF JAMES E. HENDRY, APPELLEE.

On the trial of a suit instituted to recover the price of cattle sold, a witness was asked whether he did or did not have a stock of cattle running with the stock of Alderman Carlton, known as the James E. Hendry stock, and whether or not it was formerly of the same stock: Held, the question was inadmissible.

This case was decided at Tampa.

Appeal from the Circuit Court of Hillsborough county.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

*Gettis and Mitchell* for appellant.

*James T. Magbee* for appellee.

BALTZELL, C. J., delivered the opinion of the Court.

There is but one question in this case, and that is, the refusal of the Court below to permit a question asked of a witness to state to the jury whether witness did or did not have a stock of cattle running with the stock of Alderman

Carlton's, known as the James E. Hendry stock, and whether or not it was formerly of the same stock. The Court ruled "that it would not permit this question to be asked at present, in this stage of the case, because the Court does not perceive that it is relevant to the issue before the Court." Whether relevant or not will depend upon and be ascertained alone by the state of the pleadings and the nature of the case.

The suit was instituted to recover the amount of two promissory notes, part consideration for the price of a stock of cattle. The defence was fraud, covin and misrepresentation in the making of the notes. The proof, up to the taking of the exception above stated, was that there was a public sale by the *administrator* of Hendry of his stock of cattle of the estate. According to one witness, the entire stock of cattle, excepting 20 cows and calves, South of Ocala was sold. It was proclaimed that the marks and brands, with this exception, belonging to the estate South of Ocala were for sale, and were sold. Another witness said: Proclamation was made that all the stock of cattle belonging to the estate of James E. Hendry South of Ocala, except the cows and calves purchased by the widow, were sold, except one "steer." There were several marks in those cattle, and the number of the cattle was not stated. The object of the question ruled out by the Court was as to whether there was a stock formerly belonging to Hendry running with the stock sold by the administrator, and upon this to predicate an allegation of fraud. But very clearly, we think, this result would by no means have followed even if this fact had been proved by the witness. The stock of the estate of Hendry, as it was at the time of his death, or improved by natural increase or otherwise, was the subject of sale, and not the property of others bought from Hendry in his life-time and at a time anterior to the sale.

WILLIAM B. HOOKER, APPELLANT, VS. WILLIAM H. JOHNSON, APPELLEE.

1. Where any of the pleadings of either party is pronounced insufficient upon demurrer, and the party against whom the ruling is made proceeds to plead over, the act of pleading over is a waiver of his exception to the ruling, and the point will not be considered in this Court. If he desires to avail himself of the exceptions, he must rest upon the ruling and make that the ground of his appeal or writ of error.
2. Where a witness has a joint interest with the party who calls him, either in the subject matter to be recovered or in the contract as a general partner, joint or part owner or join-contractor, by which he has an interest in the very thing claimed, or in the money to be recovered or in the costs incidental to the suit, he is incompetent to give evidence for that party.
3. Where two enter into an agreement to share the profits of an enterprise involving a contribution of labor, if a third party enter into a similar agreement with one of them to share in his portion of the profits and a suit arises between the two involving the partition under the original agreement, this third party is incapacitated by *interest* from testifying as a witness in behalf of him with whom he has made the sub-contract.

This case was decided at Tampa.

Appeal from the Circuit Court of Hillsborough county.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

*Gettis and Magbee* for appellants.

*Hart & Rogers* for appellee.

DuPONT, J., delivered the opinion of the court.

This was an action of assumpsit, instituted in the Circuit Court of Hillsborough county by the appellee, William H. Johnson, against William B. Hooker, the appellee. The declaration contained the common *indebitatus* counts for goods sold and delivered, work and labor done and ma-

terials furnished, together with the usual money counts. The defendant filed several special pleas, to which the plaintiff severally replied, To these replications of the plaintiff the defendant demurred, and, after argument had thereon, the pleas were ruled to be bad and the defendant was allowed to plead over, which he did by filing the *general issue*, upon which the case went to the jury and a verdict was found for the plaintiff. From the judgment pronounced upon this verdict this appeal has been taken, and we are called upon to review the proceedings in the Circuit Court upon the exceptions embraced in the assignment of errors.

The first error assigned is as to the ruling upon the defendant's demurrer to the plaintiff's replication, by which it was adjudged that the several pleas filed by the defendant were bad and they ordered to be stricken out. It is unnecessary for us to notice this exception further than to remark, that it has been repeatedly ruled by this Court that where any of the pleadings of either party is pronounced insufficient by the Court upon demurrer, and the party against whom the ruling is made proceeds to plead over, the act of pleading over is a waiver of his exception to the ruling, and the point cannot be considered in this Court. If he desired to avail himself of the exception, he must rest upon the ruling and make that the ground of his appeal or writ of error.—*Vide* Bailey vs. Clark, 6 Fla. Repts., 516, and the cases there referred to.

The only other exception noted in the assignment of errors, and the one on which the decision of this case must turn, is as to the admission of the deposition of Levin P. Johnson, who is alleged to have been disqualified by interest to testify upon the trial of the cause. For the better understanding of this exception, it will be necessary to go into the circumstances of the case as developed by the evi-

dence; and it is also proper to be remarked, that the recovery which was had depended mainly, if not exclusively, upon the testimony of this witness, according to his statements contained in the deposition objected to. William H. Johnson, the plaintiff, and William B. Hooker, the defendant in the Court below, entered into a contract, by which it was mutually agreed between them that the plaintiff should furnish three hands and the defendant a like number, and with this force the plaintiff was to cultivate thirty-three acres of Sea Island Cotton on the defendant's farm in Hillsborough county, in the year 1853, and to house the same; that the defendant Hooker was to build a cotton gin on the premises during the summer and fall of the year 1853, gin the crop of cotton free of toll and give the plaintiff an equal portion of all said cotton. This witness further states, that the plaintiff did plant, cultivate and house the cotton, as stipulated in the agreement, but that the defendant wholly failed to gin the cotton, and refusing to divide the crop so made with the plaintiff, he, the defendant, appropriated the whole of it to his own use. This is as much of the testimony of this witness as it is necessary to notice in this connection.

To show his interest in the subject matter of the suit, the testimony of Seth Howard is mainly relied on. This witness testifies as follows: "In the year 1853, a conversation took place at the house of witness between witness and plaintiff. Plaintiff stated that he had made a contract with defendant to go on his place; that Capt. Hooker, defendant, had given him a chance to make a crop; that he had agreed to make a crop for plaintiff (defendant;) that he was going to make a crop; that they had amongst them agreed to build a house for defendant; did not name the men, said he, plaintiff, had a son-in-law that was a good

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*Hooker vs. Johnson.—Opinion of Court.*

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carpenter, and that he and his son, or another son-in-law, witness disremembers which, were going to build the house, and he, with little force, were to make a crop; could (do so) on the farm with the assistance of some of defendant's negroes; and when the crop was made and the house finished, those who built the house and those who made the crop were to divide the result of their labor, that they might be able in the fall to settle new places; heard him, plaintiff, mention the name of Brown, another son-in-law, but don't recollect whether it was he that was to work on the house with Gibson or plaintiff's son; thinks this conversation occurred in the month of April or May, as well as witness can recollect—this April is four Aprils ago." To a question asked by the Court the witness answers as follows: "Understood from Johnson that the arrangement in regard to the division of the proceeds of their labor was a private understanding between him and his family."

The testimony of Milton Johnson was also relied on to show the interest of Levin Johnson, the reading of whose deposition had been objected to. The material portion of his testimony is as follows: "Was present at the making of a contract between plaintiff and defendant in relation to the cultivation of a farm of defendant on the Manatee river; it was in the year 1853; the contract was made sometime about the last of January of that year; was on the premises a few months after the contract was made: when there at the time last mentioned saw a house being constructed; saw Jesse Gibson and Levin Johnson at work on the house; saw Bartly Brown on the premises; is slightly acquainted with him; he was said to be the son-in-law of plaintiff; he worked upon the farm; does not recollect to have seen Brown at work on the house; was on the premises several times after the making of the con-

tract; did not see Gibson and Levin Johnson at work on the house every time I was there; saw them working on the farm occasionally; has seen them working on the house more than on the farm."

It is insisted on the part of the defendant, that this evidence fully establishes the fact that Levin P. Johnson, the witness whose deposition is proposed to be read, was interested in the subject matter of this suit under an agreement with the defendant "to divide the result of their labor." In other words, that this individual was one of the persons who constituted the "*family*" alluded to in the testimony of Seth Howard, and that being so interested, he was an incompetent witness. The position is in strict accordance with the ruling of this Court, when the subject matter of this suit was before us in another form of action. In that action it was proposed at the trial thereof to show that Jesse Gibson, who was offered as a witness by the defendant, was interested, by asking him "if he and plaintiff had not agreed to plant the premises in the declaration mentioned in partnership before or at or after the said contract between plaintiff and defendant." To this question the plaintiff by his counsel objected and the objection was sustained by the Court. This ruling constituted the main exception noted in the assignment of error filed in that case, and upon it the judgment was reversed, this court holding, "that where a witness has a joint interest with the party who calls him, either in the subject matter to be recovered or in the contract as a general partner, jointly or part owner or joint contractor, by which he has an interest in the very thing claimed, or in the money to be recovered, or in the costs incidental to the suit, he is incompetent to give evidence for that party." *Vide* Hooker vs. Johnson, 6 Fla. Repts., 730.

Now, it is very manifest that the witness objected to,

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although he were not a joint contractor, nor in privity with Hooker, one of the parties to the original agreement for the making of the crop, yet, if he be sufficiently identified as one of the parties to the *sub-contract* entered into by the plaintiff with his "*family*," he would have such an interest in the result of this suit as ought to exclude him from testifying as a witness at the trial. So far, indeed, would he be interested in the result, that if he were now to sue the plaintiff on the *sub-contract* entered into between them for the cultivation of the crop, we are not sure that the verdict in this case would not be conclusive evidence against this plaintiff of the extent of his interest. But the difficulty which we find in sustaining this assignment of error (and we presume it was the one encountered by the Judge below,) is to identify Levin P. Johnson as one of the *sub-contractors*. We have looked very carefully into the evidence embodied in the bill of exception, and we have been unable to discover one particle of evidence which goes with sufficient certainty to fix the identity of this individual as a party to the "private arrangement," testified to by the witness Seth Howard as having existed between the plaintiff and his "family." However the fact may be, there is no evidence that Levin P. Johnson was a son of the plaintiff or constituted one of the members of his family. It is true that he bears the same *sir-name* with the plaintiff and that he was seen at work on the premises, both in the cultivation of the crop and in the erection of the building, but neither one of these circumstances, nor both, are sufficient to fix his identity. That fact was susceptible of direct and positive proof if it existed, and in the absence of such proof, we are not permitted to enter the field of conjecture.

For these reasons we are constrained to over-rule this exception also, and consequently the judgment of the Court below is affirmed with costs.

This order was passed on the first of April, and a letter was received a few days after from the Judge named in

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the order, declining to take his seat on the grounds therein stated. The letter is as follows, viz:

"MONTICELLO, April 4th, 1859.

"HON. C. H. DUPONT:

"DEAR SIR: I was served, a few days ago, with a citation from the Supreme Court, requiring me to sit as a member of the Court in the case of the Sheriff of Jackson vs. Orman, Judge Baltzell being disqualified by reason of his having been of counsel in the Court below. I should obey the summons with cheerfulness but for the opinion of the Chief Justice, recently published. The public are informed by that opinion that the Chief Justice denies to the Supreme Court the power to invite the aid of the Circuit Judges under such circumstances. Justice to myself, as well as to the Associate Justices of the Supreme Court, requires that I should submit this question for its decision. You will be so good as to inform the Court that I respectfully decline to take a seat upon the Supreme Court bench until the Court have considered and decided the question now submitted.

"Very respectfully, yours, &c.,

J. WAYLES BAKER."

The ground of declination is stated by the Circuit Judge to be the position assumed "in the opinion of the Chief Justice recently published," which is alleged to be that "the Supreme Court have no power to invite the aid of the Circuit Judge under such circumstances." We have not those opinions at our command, to see what is the precise position assumed in them, (they being merely newspaper essays, not appearing in the Reports nor in any wise appertaining to the files of this Court,) and if we had, it might involve the question how far it would comport with the dignity of the Court to indulge in the discussion of a point which had been closed and settled by the most

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solemn adjudication. Satisfied, however, that his Honor, the Circuit Judge, has been prompted in his course by no feelings of disrespect to the lawful behest of this tribunal, and that he has been influenced only by considerations of delicacy, we consent to remove from his mind, if we can, any doubts which may have been engendered, by showing, as just intimated, *that the question has already been adjudicated and is no longer open for discussion.*

At the January term 1851, of this Court, this very question arose upon an order calling the late Judge Thomas Douglas to the bench, to sit at the hearing of a cause in which one of the Justices was alleged to be disqualified to sit. On his own motion, suggesting a doubt as to the constitutionality of the 5th section of the act of 1851, under which the Court has been organized, the question was entertained and the bar generally invited to discuss it. The point was ably and elaborately argued by the leading members of the profession, and with singular unanimity they concurred in advocating the constitutionality of the provisions contained in that section of the act. After mature and patient deliberation, the Court unanimously affirmed its constitutionality in an elaborate opinion, delivered upon the occasion by Mr. Justice Thompson, one of the then Associate Justices. Upon this conclusion being announced, Judge Douglas took his seat and participated in the hearing of the cause, and thereby evincing (whatever might have been his *individual* opinion) a becoming deference to the judgment of the Court.—*Vide* 4 Flo. Repts., 1.

We know that it has been alleged against that decision being taken as an *authoritative adjudication* of the question that there were no *parties* before the Court upon whom the judgment could be made to operate, and there is such an intimation in the opinion itself; but we think the ob-

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jection is more technical than substantial, and this is fully demonstrated by the objection which is likewise made against the authority of the decision subsequently rendered in this very case of Griffin vs. Orman, upon a motion by the present Chief Justice, who was then of course for one of the parties, that the cause should be tried before a Court composed of C. J. Wright and Associate Justice Semmes, Justice Thompson being disqualified to sit. The question in that case arose also upon motion, and involved the right of *two* Justices to make a Court for the hearing of appeals, and thus dispensing with the calling in of a Circuit Judge. The bar were again invited to discuss the question, which they did, with the additional aid of the talents of the Western Circuit, and it was then solemnly decided, by a unanimous Court that the law required the presence and participancy of *three* Justices to constitute a Court for the hearing of appeals. The objection made to the authority of *that* decision is not, as in the former case, that there were no *parties* before the Court, but that Justice Thompson was disqualified to participate in the consideration of the motion by reason of having been of counsel for one of the parties, and that before the judgment was illegal, as not having been made by a competent Court. This objection, however plausible it might be on the part of those who hold that it requires *three* Justices to make a Court, is certainly preposterous when attempted to be urged by those who advocate the sufficiency of *two* Judges; for there were at the hearing of the motion two against whom no objection of disqualification could be made. If it be said that the judgment of the two was probably moulded by the influence of the disqualified Justice, and therefore void, the reply is, that no such presumption may obtain in the case of judicial officers of such high grade without debasing the institution to a level that

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would deprive it of the public confidence. However the fact may sometimes happen to be in isolated cases, yet it will never be *presumed* that a Judge, standing as the solemn arbiter of the life, property and reputation of the citizen, can be affected by *outside influences of any character whatsoever*. The objection manifestly is the result of a singular confounding of ideas and a strange want of discrimination as to the *extent* of the statutory disqualification. The disqualification is evidently limited to the "determination of the case" in which the Judge may have been of counsel, and does not reach to that higher question, *the organization of the Court*. To hold any other view of the matter would be at once to violate and set at naught a most vital and fundamental principle, and at the same time to declare that in no contingency can the question ever be settled by *judicial judgment*. It is a fundamental principle, growing out of the very necessity of the case, that all bodies invested with the exercise of *supreme* power must have the right to sit upon and determine the question of their organization. It would be an insult to common sense to argue such a proposition. It is an *axiom*, and to state it is to prove it.

But we have said, that if the decision in that case was not *authoritative*, then the question can never be settled by *judicial authority*, and this must be manifest to the weakest comprehension. It is evident that the question as to the right of calling a Circuit Judge to the bench, or of the competency of *two* Justices to make a Court, can never arise until a case shall come in which one of the Justices shall be found to be "disqualified or disabled from hearing and determining the cause," and yet the moment that the contingency happens (according to the argument of our opponents,) the Court is disorganized and there exists

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no tribunal competent to determine the question. If the point is submitted to the whole bench of Judges and decided by them, the decision is objected to on the ground that it was made under the pressure of an outside influence exercised by the disqualified Judge, and yet to submit its determination to *two* Judges, or a bare majority of the Court, it will strike the simplest mind, would be *beg the question*. The fact is, we are contrained to designate the objection as the extreme of captiousness.

But a simple reference to the true history of this discussion will show that it is too late *now* to question its authority as an *adjudication* of the point then under consideration. When the motion was made at the bar that the Chief Justice and one Associate Justice should hear the cause, and the question arose thereon as to their competency to form a Court without calling in a Circuit Judge, Justice Thompson himself suggested the question; but, upon a moment's reflection, all doubt on that point was dissipated by the unanimous sentiment of the bar present, and, if objection was made by any one, it is not so recorded. And, if objection had been made, it would doubtless have been overruled, as it ought to have been.

To conclude the argument as to the *authority* of the two cases referred to, (for we have not felt ourselves at liberty to re-discuss questions that we consider to have been settled by the body of which we are constituent members,) we remark, that, if there ever was a doubt on that point, the *uniform practice* of our predecessors and our own *acquiescence* for the five years that we have occupied the bench, ought to be sufficient to settle the mind of the most doubting and skeptical. To undertake to raise the question at this day would be attended with the most disastrous con-

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sequences; for, it is known to the profession, and so recorded, that a majority of all the important cases that have been decided for the last seven years have been determined by a Court with the Circuit Judges as a constituent element of its organization.

We conclude, then, that upon sound principle and long acquiescence, there is no ground for the doubt suggested by his Honor, the Circuit Judge, and that he ought to have obeyed the summons contained in the order of this Court.

Had the failure of the Circuit Judge been the consequence of an *obstinate refusal* to obey the citation, another question, of a very grave character, might have arisen as to the power of this Court to *compel* the attendance of its members. Upon this point, we have no hesitancy to declare that the members of the Court are upon the footing of the most perfect equality—they are peers, co-equal in power and dignity—and that neither one, nor even two, have any legal authority to *compel* the attendance of the other. Each is responsible only to the source whence his commission is derived, and the law has wisely provided an ample remedy against the consequences of a neglect of duty by the provision for *removal and impeachment*. To hold otherwise would be to shear the highest judicial tribunal of the State of its appropriate dignity and to bring it into utter contempt and ridicule. The position of a Circuit Judge, when called to the Supreme Court bench, is the same as one of the Justices, and we therefore hold that we have no power to compel the attendance of his Honor Judge Baker.

If we shall have succeeded in removing from the mind of his Honor the obstacle in his way, and contributed in the slightest degree in laying this mischievous and dis-

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organized question, we shall feel that our labor has not been in vain.

We do not arrogate to this argument the designation of an "opinion." It is merely the expression of the concurrent views of two Associate Justices of the court on a question growing out of an order that they were expressly authorized to issue, under the provisions of the 5th section of the act of 1851, under which this court holds its organization.

DUPONT, J.

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The opinions of the Chief Justice, referred to above, are appended hereto.—REPORTER.

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#### OPINION BY BALTZELL, C. J.

The Justices of the Supreme Court have no power to make or appoint Judges for the Court, nor has the Legislature such power conjointly with the Judges.

Hon. B. M. Pearson, Associate Justice, being absent and not expecting to attend this session of the Court has requested that a Circuit Judge be appointed to officiate in his stead during the term.

Whilst the practice of the court has been to call in such Judge to try a particular case, at no time has an application like the present been made or granted.

The question is a new one, of great importance and interest, as well under the law under which the power is claimed as the Constitution of the State. This law declares, that "whenever, from any cause, any one or two Justices of the Supreme Court are disqualified or disabled from hearing or determining any cause brought before them, it shall be the duty of the Justices of the said Court

to *notify* the same to any one or two Judges of the Circuit Courts of the time and place when such causes may be set for hearing, and it is hereby made the duty of such Circuit Judge or Judges, when receiving such notice, to attend at the time and place designated, and he or they shall be and are hereby invested with full authority, in conjunction with the remaining Justices or Justice of the Supreme Court to hear and determine the causes of which they were notified aforesaid."—Page 122, Laws 1851-'2.

By a subsequent law, "whenever one or more Judges of the Circuit Court shall, under the provisions of the fifth (the aforesaid) section, hear and determine causes in the Supreme Court, the said Judge or Judges, for the time during which he or they shall be so engaged in hearing and determining said causes, shall be and constitute a part of the Supreme Court of the State of Florida, anything in the act to which this is an amendment to the contrary notwithstanding."—*Ib.*, p. 125.

There is no provision here for the appointment of a Judge for the term. So far from it the authority to appoint is restricted to a case of disability in hearing and determining a cause or causes, and the power of the Judge so appointed is confined to the hearing and determining the same. To imply from the language used a power beyond this, so large and extraordinary on the part of the Justices of the Court, is justified by no rule of law which I am acquainted, and prohibited by considerations of an imperious and overruling character.

The constitution of the State divides the great powers of government into three departments: vests one of them, the "judicial," in a Supreme Court, Courts of Chancery, Circuit Courts and Justices of the Peace. It declares the character of the power vested thus: "The jurisdiction of the Supreme Court shall be appellate only;" provides for

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the term of office of the Justices, for their election by the people, their commission by the Governor, their appointment by him in case of a vacancy, their taking an oath that they are duly qualified according to the Constitution of the State to exercise the office to which they have been elected, and "that they will, to the best of their abilities, discharge its duties and preserve, protect and defend the Constitution of the State and of the United States," and for their "removal in case of misdemeanor or neglect of duty."

During the Territorial Government, this judicial power was invested in five inferior Judges, termed Judges of the Supreme Court. This, after organization into the State, continued by provision of the Constitution, vesting the appellate power for five years in Circuit Judges. At the expiration of this time, in accordance with the directions of this instrument, a separate Supreme Court was organized to consist of three Justices. These were first chosen by the Legislature, but afterwards, under an express amendment of the Constitution, were elected by the people and their term of office fixed at five years. The Justices thus elected would seem to be vested with the entire powers of the Supreme Court, unless, indeed, it can be shown that the Circuit Judges can be rightfully associated with them in the discharge of these duties.

The eighth clause of the sixth article of the Constitution provides, that "no Justice of the Supreme Court, Chancellor or Judge of this State shall be eligible to election or appointment to any other and different station or office or post of honor or emolument under this State until one year after he shall have ceased to be such Judge."

The eighteenth clause of the fifth article declares, "that no duty not judicial shall be imposed by law upon the

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Justices of the Supreme Court, Chancellor or Judges of the Circuit Courts of this State."

In England, and other civilized nations, the power of electing or appointing Judges is with the Executive; in the United States, with the Governor, the Legislature or people of the State. Nowhere, in any government, republican, monarchical or despotic, is such power lodged with the Judges.

If it be said that these do not elect or appoint, their selection being confined to the persons designated by the Legislature, this does not cure the difficulty. It shows a joint action of the Legislature and Court, which is not less objectionable than if it were the separate action of each. Such appointment is manifestly not a judicial duty. "No Judge of the Circuit Court shall be eligible to election or appointment to any other and different station or office, post of honor or emolument." Can language be more expressive, more free from ambiguity? If the position of Justice of the Supreme Court be a different station, office, post of honor or emolument from that of a Circuit Judge, then the holding of it by the latter is clearly prohibited. The two offices are treated as different in this section and in various other provisions of the Constitution, and obviously, if they are the same, then a Justice of the Supreme Court, without any appointment or act of the Legislature, would be Judge of the Circuit, and the latter Justice of the Supreme Court.

It is said in support of the appointment, that the language of the prohibition "points not alone to another station or office, but to one which is also different in its structure, character and duties and the nature of its functions." Admit this and it sustains our position.

The Justices of the Supreme Court are elected by the people of the entire State; of the Circuit, by those of a

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particular district. The former elected, commissioned and sworn to perform appellate duties, and them only—the latter duties of an original character. The Supreme Court consists of three Judges, the Circuit of one. The latter acts through the agency of juries, grand and petit, and Solicitor, directly upon the people; the former, without such aid, upon the Circuit Judges, correcting, revising and controlling their action, so that difference in structure, character and of duties and nature of function is clearly apparent. Unusual care seems to have been taken by the framers of the Constitution to give to this provision the largest extension. Thus the prohibition is not confined to one holding an office, but a station, post of honor or emolument, so that the only escape would seem to be by holding that the office of Justice of the Supreme Court of the State is neither an office, post of honor, station nor emolument, which would involve the glaring enormity of committing to an individual having none of these attributes the right of presiding in the highest tribunal in the State to determine, in the last resort, questions and issues in which the life, liberty and property of the citizen are involved.

There is no excuse for giving to the provision a narrow and limited construction. Its object is to confine the officers to the legitimate duties of their offices, is remedial in its character and should have a liberal construction to carry into effect this design. If this were at any time doubtful under past legislation, all difficulty is removed by the payment of two of the Circuit Judges of five hundred dollars each for their services in this capacity, and a permanent provision by law of the last Legislature for the payment of their expenses, so that the office now is one of emolument.

Other provisions of the Constitution, already alluded to, not so expressly prohibitory or peremptory, yet equally

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imperative, will be perceived to have an application adverse to the exercise of the power. By an amendment of the Constitution, the election of the Judges was assumed by the people, without reserve or qualification, except as already stated. It was taken from the Legislature, as at first ordained and their term of office fixed at five years. They were required to have a commission, to take an oath and are subject to removal for misbehavior. Where is the authority of the Legislature to repeal these provisions—to displace this action of the people—resume it again in connection with the Judges—by a mere notification make a Judge of the Supreme Court for the term of a month—install this person as Judge without election, without commission, without oath and without responsibility, and assign him to the discharge of this duty? If there had been design for a division of power between the people, Legislature and Judges, would the Constitution have been framed as it is? Would not such design have been expressed in language clear and unambiguous? The constitution of a court of Circuit Judges with the regular Judges has not found favor with the American people, the only instance of the kind being in New York by express constitutional enactment. In all the other States but one, there is a separate Supreme bench or the Judges of the Supreme Court are charged with circuit duty, the latter being the case with the Supreme Court and eight of the Northern States. South Carolina is the solitary instance of an appellate Court made up wholly of inferior Judges.

The question may be thus summed up: The Constitution divides the judicial power into original and appellate, conferring the latter upon the Supreme Court Justices, the former upon the Judges of the Circuit. The Legislature takes a portion of this power from the Supreme Court

Judges and gives it to the Circuit Judges, enlarging their jurisdiction so as to make it both original and appellate.

The Constitution declares, that the people, not the Legislature, shall elect Supreme Court Justices. The Legislature and Judges of the Supreme Court, by this law, are to elect and make Justices of the Supreme Court. The Constitution fixes the term of office of the Justices of the Supreme Court at five years. These Circuit Supreme Judges have a term of office of one day, one week, or month, as the case may be. The Constitution provides that the Justices of the Supreme Court shall have a commission, take an oath and be liable to impeachment. These new Legislative Judges have a *notification* as a substitute for all these and the only guarantee for the faithful discharge of duty.

The Constitution prohibits the Judges from the performance of duties not judicial, the Legislature imposes the duty of making a Judge of the Court no where regarded as a judicial duty.

The Constitution provides that no Judge of a Circuit shall hold another office, the Legislature makes him a Judge of the Supreme Court in addition.

Whilst there is such a clear and manifest contrariety—such evident repugnancy in provisions made by the Constitution and Legislature—either one or the other must give way; both cannot exist together. The Legislature derives all its authority from the Constitution, which expressly declares that all enactments contrary to it shall be void. Whilst having these views so free from doubt, it becomes a duty to enquire into the decisions of other Courts, to ascertain the light afforded by them on this interesting question.

In the Constitutional Court of the State of South Carolina, composed of Judges Grimke, Bay, Brevard, Colcock, Nott,

Smith and Gant, the question was, whether the Governor has a right, in case of the sickness of a Judge of the Circuit, so as to be unable to hold Courts, to appoint a person to perform his duty during the remainder of the Circuit. In the opinion delivered, the following admirable sentiments were expressed: "A Constitution is defined by an English Judge to be 'a form of government delineated by the mighty hand of the people.' It is the supreme law of the land; it is the commission from which legislation derives its power; it prescribes their limits and sets their bounds; it says to them 'hitherto shalt thou go and no farther.' A written Constitution constitutes the great difference between a free government and a despotism; for, whether unlimited power is committed to the hands of one person or many, it is equally liable to be abused. Destroy the written Constitution, and the Legislature possesses the same arbitrary and unlimited control over the people as a British Parliament." After saying that some general clauses of the Constitution will confer the power contended for, the Judge proceeds: "But other parts of the Constitution qualify the general power and direct the particular manner in which it shall be exercised. The latter part of the same clause declares that the Judges of each, that is of the Superior and Inferior Courts, shall hold their commissions during good behavior, &c. We find here four indisputable requisites to constitute a Judge of the Superior Court: 1st, he shall be elected by a joint-ballot of both branches of the Legislature; 2d, that he be commissioned during good behavior; 3d, that he shall receive a stated compensation for his service; 4th, that he shall hold no other office of profit or trust. And yet, here is a Judge of the Superior Court appointed by the Governor and not elected by a joint ballot of both Houses of the Legislature, commissioned for a limited time and not

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during good behavior, required to render his service gratis and having no stated compensation. All of which is indeed in violation of the different provisions of the Constitution above mentioned. It is said there are no negative words restricting the powers of the Legislature in this respect. But sometimes affirmative words imply a negative of what is not affirmed as strongly as if expressed, and the Constitution must be understood in that sense. It is a form of government established in which they have declared in what manner its different members shall be organized and the Legislature can introduce no other. When the Constitution says the Judges shall hold their commissions during good behavior, it means all the Judges. The object would be defeated and that part of the Constitution became nugatory, if the Legislature could authorize a different mode of appointing Judges and require them to hold their offices for a different term." *Cohen vs. Holt*, 2 Const. Rep., 661. A case more in point could scarcely be desired. What is more, the Court was unanimous. In confirmation of these views is a decision of the Court of Virginia. In their old Constitution was a provision that the two Houses of the General Assembly shall, by joint-ballot, appoint Judges of the Supreme Court of Appeal and general Court, Judges in Chancery, &c. By an act of the Legislature, the power of granting injunctions was confided to the District Courts. The power of these Courts was contested, and, on reference to the Judges of the General Court, consisting of Tucker, Tyler, Roane, Henry and Nelson, there was a unanimous conclusion that the law was unconstitutional; that the duties required to be performed by the act could only be executed by persons constituted Judges in Chancery in the manner prescribed by the Constitution. They held that the specification in the Constitution of Judges of seve-

ral tribunals led to the conclusion that the tribunals themselves were meant to be separate and divided; that Judges in Chancery could not, by legislative enactment, be required or empowered to sit in the General Court, nor the Judges of the latter to sit in Chancery, or to perform the functions of Chancellor, but that each class of Judges was designed to be restricted in the performance of duty, to the Court to which they were severally elected and commissioned.—Harper vs. Hawkins, 1 Virginia Cases, 20.

In Tennessee, a like question was decided, Catron, C. J., now Justice of the Supreme Court of the United States, delivering the opinion. The Judge of a Circuit being sick and unable to perform the duties of his Court, another appointment was made, and the question was, had the Legislature the power to bestow on the Governor or any other agent the authority of appointing Judges of general jurisdiction? It is an axiom in government that that which the Legislature itself had not power to bestow, it cannot confer on an agent; the principal having no authority, the deputy can have none.—1 Yerger, 457.

Whenever a State Constitution prescribes a particular manner in which power shall be executed, it prohibits any other mode of exercising such power on that particular subject. The authority is supported by constitutional provision, and an attempt to render it nugatory would be an attempt at repeal.

“The Constitution being the paramount law, all acts of the Assembly coming in conflict therewith are void. Let us apply this rule to the present case. The fifth article of the Constitution provides, ‘that the General Assembly shall, by joint-ballot of both Houses, appoint Judges of the several Courts of law and equity, who shall hold their respective offices during good behavior.’ Here the Constitution has made no exception in favor of the Legislature

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giving authority by law to an agent to appoint Judges. The two Houses, acting jointly and voting by ballot, is the only appointing power under the Constitution. The Legislature has just as little right to change the appointing power of their own members.

“The 8th section of the Constitution declares that in case all the Judges of the Supreme Court shall be interested in the event of a cause or connected to either of the parties, the Governor shall appoint, &c. This clause never contemplated that the Judge of the whole people and of general jurisdiction, extending to every member of society, should be appointed by the Governor. Cases in Courts which the Judges in office are incompetent to decide, are alone referred to. In all other matters, the regular Judges are in the exercise of their full powers. These the Legislature had no power to take away without resignation or removal. These continued during good behavior, and when they ceased they ceased forever. Here one Judge could have been put out and another put into office by a mere legislative act. If a Judge could be removed for a year, he could forever; and if one could be appointed for so short a time, so he could for any time. If the Legislature could not do this, it could not empower the Governor to do what itself had not power to do.” The Court held the orders, decrees and judgments made by this individual void.—*Smith vs. ———*, 3d Yerger, 271.

My associate differs with me, holding the law constitutional, and that there are two decisions of this Court settling the question. If there are such, they should undoubtedly have great weight in its consideration. On the first organization of the Court, after the election of Justices by the Legislature, my late associate, the Hon. Thos. Douglas, then a Circuit Judge, objected to sitting as Supreme Court Justice, and on this occasion an opinion was

pronounced, which is claimed to be one of the decisions alluded to. The court then had no idea that they were making a decision, and say so in express terms. "Whether we were wise in thus assenting to consider the subject in its present shape, and to express our opinions thereon, is in itself a question of *doubtful propriety*; yet, we shall feel some gratification if our judgment, although it may be termed extra-judicial, shall express sufficient weight to put the matter at rest."

Again, "the judiciary has no direct delegation of power to declare an act of the General Assembly unconstitutional and void, but is an incidental power unavoidably exercised in administering the paramount law of the Constitution. To call this incidental power into action, there must be a *suit* or *judicial proceeding*, in which a conflict arises, or is supposed to arise between the Constitution and a statute, and which affects the rights of parties litigant. In the present case, there is no such suit or other proceeding before us, and, if we had a doubt on the subject, it would be our duty to decline giving an opinion until the question was directly presented for adjudication."—4 Flo. Reports, 6.

The remarks contained in the case of Griffin vs. Orman, on a motion to try with two Judges, form the other decision alluded to. Neither on this nor the other occasion is there an expression of the opinion that the appointment for a term was right and proper. The contrary is indeed inferable from the language of the latter case. Thompson, Justice, although disqualified, delivered the opinion and says: "The 8th section of the act of 1845 provides that three Justices shall be a quorum to transact the business of the Court, and if three do not attend on the first day of the term, the Sheriff shall adjourn the Court from day to day for a week, and then if three do not attend, to adjourn

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it for the term. At each point, Tallahassee, &c., the Justices have been prevented from attending on the day appointed by law for the opening of the term, and but for this section the terms would have been lost and much inconvenience would have resulted from ordering extra or special terms."—5th Florida Reports, 336-7.

Was there reasoning or authority adduced in support of either opinion as to this subject, it would tend greatly to enlighten; but there is little or none here, and small aid is derived from mere *dicta* of Judges on any occasion. It is gratifying to me to be able to say that my late associate, the Hon. Thomas Douglas, who examined this subject with the research and unwearied patience and assiduity for which he was so distinguished, was fully confirmed in the views I have expressed.

After the fullest reflection, and every desire to sustain the act of the Legislature, I can but feel that it is expressly prohibited by the Constitution. Indeed, to say that it is not, would be a direct assumption on the part of the Justices to hold an election and cast ballots in the name of the people, declare the majority in favor of an appointee, treat him as having a commission and pronounce him, without any oath of office, fully qualified as a Judge.

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#### OPINION BY BALTZELL, C. J.

1. The Supreme Court is competent to act through a majority of its members.
2. The presence of all is not indispensable to the transaction of public business.

In the absence of the Hon. B. M. Pearson, one of the Associate Justices, the court being divided on the motion to summon a Circuit Judge to sit in conjunction with

the Chief-Justice and the remaining Associate, the question arose as to the power of the two Justices present to hold the term of the Court. Being divided on this question also, and holding the affirmative, I deem it imperative duty to set forth and state the reasons which induced this opinion.

I hold that a *majority* of the Court constitute a quorum for the transaction of the public business—my Associate, that the presence of all the Justices comprising the Court is required. I now proceed to consider each of these propositions:

The question of the competency of a less number than the whole of an appellate tribunal to hear and decide causes, independent of constitutional and statutory provisions, is treated with such clearness and force—such ability, comprehensiveness and power, both on principle and power—by Ruffin, Chief Justice of the Supreme Court of North Carolina, in a capital case on appeal from a refusal of a Circuit Judge to execute the mandate of the Court, as to leave but little to amend or add to the opinion, which I think worthy of being inserted entire. I, however, present only such extracts as are especially pertinent and directly to the point:

“For the purposes of the other question, we will, then, assume that Judge Gaston had died before the last term began, and that his seat had not been filled. The enquiry is, whether, in that case, the two surviving Judges were obliged to hold the Court, or was the whole jurisdiction suspended until the appointment of a successor. Few can doubt on which side our answer would be, if we were allowed to consult our personal ease or private wishes only. It can be understood by any one, and we know by experience that the burden of this office is much lighter

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when divided among three that two. It is very sensibly so as respects the degree and duration of the labor, bodily and mental. But the difference, in point of responsibility, to one having just views of the functions of a Court of the last resort for causes of all kinds, criminal, common law and equity, is not easily to be conveyed to one who has not known for himself. We had every motive, therefore, apart from a sense of duty, to postpone the exercise of our office until our share of the duties would be smaller and their difficulty diminished. But the judicial power is not conferred on the Judge for his own gratification, either by distinction in station or for its emoluments, but for the public service. If, therefore, the Judge finds he has the power to decide a cause brought before him, a correspondent duty instantly arises that he should decide it. We have no more right to decline exercising a power, conferred by law for the general benefit, than we have to assume powers withheld by the law for the common safety. Accordingly, when the lamented death of Judge Gaston occurred, I can with truth say, my brother Daniel and myself, with a single eye to our public duty, set ourselves earnestly to enquire what the legislative will and the general rules of law authorized us to do in that emergency; and, with all the lights we could get, having come to the conclusion that the judicial power survived, notwithstanding the death of one of the members of the Court, it followed as a corollary that we were obliged to exercise it, and proceed in administering the law of the country. It is due to ourselves and to the bar, which, owing to particular circumstances, attended at the time in greater numbers than usual, that we should say, the question did not pass *sub silentio*, nor was the conclusion arrived at upon slight consideration. On the contrary, the Judges thought of it deliberately; and we communicated our views pub-

licly to the bar, inviting their particular attention to it as a body. The next day, I again stated from the bench the opinion the Judges had formed on the point, and the general grounds on which we went; and requested, if the opinion of the bar was different, or if any gentleman had doubts on it, that it should be fully argued. The opinion of the bar was then given unanimously, that the surviving Judges had the power of holding the Court. \* \*

"I then proposed to put our reasons for the opinion into writing, that thereafter it might be seen to have been distinctly determined; but, by general consent, the point was deemed so plain that it was thought no one could doubt on it, and that we might well spare ourselves the pains of writing an opinion.

"I will now, however, state the general views taken by us upon the occasion mentioned, which, indeed, are much the same that we now entertain. Before doing so, however, it may be well to dispose of some matters which really seem too trivial to be introduced to aid in construing a statute constituting a high Court of justice.

"In the first place, then, we admit, that if persons refer a question to the arbitrament of three, the award cannot be made by two of them, but only by all three. But the Judges of this Court are not arbitrators. Although arbitrators are sometimes, by way of similitude and illustration, called Judges of the parties' own choosing, there are great differences between them and us. Arbitrators are appointed by the agreement of the parties, and therefore they must act according to the agreement; and when the agreement is for a decision by three and not by a majority of the three, all must concur; else, it is no award at all. It is a case of mere private power. But we are appointed by the country and to decide causes, whether the parties will or will not, according to the course of the law. Now,

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the rule with respect to powers of a public nature, even though not judicial, conferred on several, is, that the decision of a majority is valid.—Co. Lit., 181, b. This is a settled principle of the common law, descending even to aggregate corporations. Thus in the Attorney General vs. Davy, 2 Atk. 212, Lord Hardwick held, that a majority might act, though nothing was mentioned in the charter to that effect. The same doctrine was applied to contracts made by church wardens and overseers of the poor in Rex vs. Beeston. 3 T. R. 592. And the general principle is stated and fully considered in Grindley vs. Barker, 1 Bos. & Pul., 229. The only exceptions to the principle, within our recollection, are juries. The common law wisely requires the verdict of a petit jury to be unanimous; and, in favor of the accused, that a grand jury shall not act by a lean majority, but that a bill must be found by not less than twelve. But a Court of justice is neither a body of arbitrators, nor a jury of either kind.

“We likewise admit, that, if a statute empowers two judicial officers to do a particular act, they must meet and execute it, together, and cannot act separately; as if an appointment of overseers under the 43 Eliz. be signed by two justices, separately, it is bad.—Rex vs. Forrest, 3 T. R., 38. But there can be no majority of two persons which will not include both; and, as that is so, the parties have a right to their united judgment on consultation. But that does not establish that the general rule, that a numerous body, that is to say, consisting of three or more, with powers for public purposes, may act by the major part, does not apply to a Court composed of three or more. On the contrary, it is peculiarly fit that judicial decisions may be made by a majority; else, litigation would be interminable. *So, if two may give the judgment of the Court against the third, two must be competent to hold*

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*the Court alone, unless the commissions of the Judges or the statute constituting the Court require, that all three should unite in the judgment, or, at least, that they should all meet together, so as in every case to take the sense of each and every one of them. A fortiori, if one of the three be dead, the survivors, who still constitute a majority of the whole, must be competent to act. It is to be remembered, that the question concerns the exercise of the judicial power, and that the general interests require that, as it is absolutely necessary to the welfare of the State, and may at all times be needed, it should never be suspended, unless the legislative will to that effect be plainly expressed, or is to be as plainly implied. We admit, indeed, that if the commissions, or the statute, according to a just interpretation, required all the Judges to unite in opinion, or even to be present when the judgment is given, then less than the whole number can do nothing, from whatever cause the whole number may not have convened. So, if a particular number of a larger body be required, the consequence is the same. Thus the statute, constituting our County Court, and authorizing all the justices, 'or any three of them,' to hold the court, plainly implies that less than three cannot hold it. But simply appointing a certain number of Judges of a Court, exceeding two, does not in itself amount to an enactment that all those Judges should either unite in judgment or in consultation; nor does it import that they should unite in consultation more than in opinion. The question therefore depends upon the proper rules of construction to be applied to statutes regulating or conferring judicial powers, and the true meaning of our statute, ascertained by those rules.*

"Now, we begin with the principle, that this is not like the grant of a private power and to be construed strictly, according to the very letter; but that it is of a public

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nature, to be exercised for the common weal, and, therefore, may be exercised by the major number of those with whom it is entrusted. \* \* \* \* \*

"It is said that all the Judges are required to compose a court, by force of the term 'Court.' Certainly, that does not necessarily follow; for a Court is often held by a part of those who have the power of sitting in it, and if it were not so, some numerous courts never would be held, as all the members never would be got together. Then, it is said, that if that be not so, generally, the word is used in that sense in this act. But that is disproved by the fact that the judgments of 'the court' are given by the majority of the Judges. If all the Judges be necessary to constitute 'the Court,' then all must also be necessary to give the judgments of the 'Court,' as far as the import of that term, in itself, goes. But it is admitted that it is not true in the latter respect, and that the majority may give the 'judgment of the Court.' But upon what principle is that so? It is not in the statute, in words, that two may decide against one. Therefore we must resort to something else to restrain it. It is said that it arises from necessity. But what is the necessity? It must depend upon reasons differing from those which require arbitrators and jurors to be unanimous. Why, plainly, this is the necessity: to prevent the failure of justice by having no decision. It is the old principle of the common law that the interest of the public, that powers of rare public nature should be exercised, makes it necessary to enable the majority to act in opposition to the minority. A necessity of precisely the same nature, if not to the same extent, calls for the exercise of the judicial power by the majority of a Court in the absence of the minority; and especially requires that the power shall not become dormant upon the death of a Judge. \* \* \* \* \*

"We find, indeed, that we were wrong in supposing that the general rule, in respect to the exercise of powers of a public nature, is applicable to the judicial power. The common law deems it of such high consequence that it shall never be suspended, but that the tribunals of justice should at every term be always open to suitors, that it adopted the principle that each one of several Judges of a Court may hold it.

"Sergeant Hawkins thus lays it down in his chapter on Courts of criminal jurisdiction. He says, that, regularly, when there are diverse Judges of a Court of record, the act of any one of them is effectual, *especially if their commissions do not expressly require more*. So, if a writ be directed to two coroners, one of them may not serve it, as it is a ministerial act; but one of them may hold an inquest, because that is an act judicial.—Viner Abr. Coroner D. Thus it appears that, at common law, each Judge has the full judicial authority, unless he be required expressly to exercise it in conjunction with others; as in the *quorum* clause of the commissions in England, or the provisions in our act requiring three Justices of the Peace, at least, to compose a County Court. Accordingly, one Judge has often sat on the two benches at Westminster Hall; though, as there is very seldom an occasion for it to be done, he prudently declines the decisions of demurrers or difficult points of law.—3 Chitt. G. Pr. C., 6 to 17." 4 Ire. Rep., 447 to 459.

In continuance of the subject, I propose to offer a few observations, which seem to me not inappropriate. The Superior Courts of Law in England are the King's Bench, Common Plea and Exchequer, each having four Judges, and their mode of action is thus given by Lord Eldon, stating that of the King's Bench, if a difference of opinion takes place amongst them, if three are in Court and

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two concur in opinion against the third, that is sufficient; but if all four are in Court, and two are of one opinion and the other two are of a different opinion, in law it is not the judgment of any of them.—11 Vesey, 159.

The Judges of these three Courts, (eight of them,) excluding those who decided the case appealed from, constitute an appellate tribunal, the Court of Exchequer Chamber, a majority is competent to act.

In the United States, the same course prevails through the common law as announced by the Court in their decisions and practice or by constitutional or statutory provision. Thus it is in the State of Georgia, Alabama, Tennessee, Kentucky (until recently,) Mississippi, Missouri, Texas, California, Wisconsin, Iowa and Arkansas, composed of three Judges, and in the Federal Government and the other States composed of a greater number, the only exception being New York, where five out of eight are required, and in no instance is unanimity of the whole bench requisite; and in Alabama one Judge is deemed sufficient. Here it may be proper to observe, that a statutory, or even constitutional provision, in affirming the common law adds but little, if any, force to it. "Where the common law and a statute differ, the common law gives place to the statute, if expressed in negative terms. Where both acts are merely affirmative, and the substance such that both may stand together, the latter does not repeal the former, but both shall have concurrent efficacy."—1 Black. Com., 90; Ba. Ab. Stat. G.

The decisions of the American Courts are to this effect: "It may be safely said," says Gibson, Chief Justice of the Supreme Court of Pennsylvania, "that any duty of an aggregate organ of the government may be performed by a majority of its members, where the constituting power

has not required a concurrence of the whole.”—3 Law Rep.

“There is a train of reasoning and authority to show that in all bodies executing a trust of a public nature, a majority may act.”—1 McCord, 52.

The enquiry yet remains as to the law of our own State. During the Territorial government of thirty years, the rules of the majority prevailed by act of Congress, as there were respectively three or five Judges. The Constitution has expressly recognized and announced the great principle of the *jus majorum* in its practical application to the first appellate tribunal it directed to be organized. The third section of the 5th art. Judicial Department devolved the powers and duties of the Supreme Court upon the several Circuit Judges, saying: “They or a majority of them shall hold such sessions of the Supreme Court and at such times as may be directed by law.” The first State Legislature organized four circuits and enacted that three of the Judges should be a quorum to hold the court. The principle of the majority was thus established, both by constitutional and legislative authority. I hold that it pervades the Supreme Court, or appellate tribunal, which the Legislature thereafter organized, being the expression of sovereignty on this subject which became henceforth the controlling rule of action—the standard which paramount authority itself deliberately enacted. If this be true, it follows that a legislative enactment requiring the presence of the whole Court, of whatever number composed, would be obnoxious as an infringement of the rule thus established. Nor is the rule of a majority of less than a majority even confined to Courts of Justice proper, but extends to all bodies charged with a public duty. The State Senate is by the Constitution constituted a Court of the trial of impeach-

ments; yet, although two-thirds are required for a conviction, as a majority is a quorum, eight members in a body of twenty, in all probability, might be sufficient to convict.—Art. 6, sec. 20, 21; art. 4, sec. 8, Constitution.

A majority of the Legislature is a quorum, so that far less than a majority of the whole number may pass a law. The Governor, Judges, Representatives to Congress and members of the Legislature are elected by a plurality less than a majority of the people. In some of the States North, the strict rule of the majority is preserved in these elections.

The act of 1851, it is said, has the effect of making the presence of all the Justices necessary to the formation of a Court by providing that “when any one or two of the Justices are disqualified or disabled, it shall be the duty of the Justices of the said court to notify the same to any one or two Judges of the Circuit Court.”—Laws 1850, 122.

The design of the Legislature obviously was not to impair, but to increase the efficiency of the court and enable it to perform its functions without embarrassment or obstruction, and this act should be so construed as to attain this end. We may not impute to the Legislature a disposition to infringe the Constitution by providing a rule differing from that which the paramount law had ordained, nor even to repeal a rule prescribed by a statute or existing at common law, although there was no constitutional provision on the subject; it would not be proper to do so, even if the words, by a literal construction, would bear such a meaning. The power and jurisdiction rightly vested in a high department of the government, indispensable to its proper action, to its very existence, is not thus to be disturbed nor displaced, nor are rules and principles materially affecting it thus to be made and enacted. This is to be done only by language clear, direct and positive—

not by implication nor inference. The Legislature, if designing such an alteration, would have said in express terms: "A majority shall not act—the presence of all the Justices shall be required." Not having said so, their silence is the best evidence that there was no such intention. I hold, then, that the statute is satisfied by calling a Judge or Judges where there is not a competent Court or a majority of the Justices present. Such was the view of the Court of Appeals of South Carolina, consisting of three Judges, under a statute of like import with ours, passed in 1824, declaring, "that if any one or more of the Judges should be absent, sick, dead or disabled, the eldest circuit law Judge should be notified to attend," &c.—7 Statute South Carolina, page 325, enacted in 1825 and '32. Under this provision repeated decisions were made of cases by two Judges, a majority of the Court, the reporter stating the third Judge to be absent, to have been of counsel, &c. 1 Hill's Ch., 10, 14, 25, 32; 2 Hill & Bailey's Equity Session.

The names of the Judges, Nott, Colcock, David Johnson and Harper, are sufficient guarantee for the legality of the action and an authority almost irresistible against such a provision operating as a repeal of the majority rule.

A reference to the rules of construction of statutes will still further sustain this view of the subject. Statutes are to be construed in reference to the principles of the common law; for, it is not to be presumed that the Legislature intended to make an innovation further than the law absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what is plainly specified; for, if such had been the design of Parliament, they would have expressed it.—2 Dwarries, 675.

"There are three points to be considered in the con-

struction of all remedial statutes: the old law, the mischief and the remedy; and it is the business of the Judges so to construe the act as to suppress the mischief and advance the remedy."—1 Black, Com., 87.

The invariable rule of construction in respect to the repealing of statutes by implication is, that the earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other. And it is a general rule that subsequent statutes which institute new methods of proceeding, do not repeal former methods of proceeding ordained by preceding statutes without negative words.—2 Dwarris on Statutes, 174; Mitchell vs. Duncan, 7th Fla., 18. Statutes directing the mode of proceeding by public officers are advisory and not essential to the validity of the proceedings themselves, unless it be so expressed.—5th Wend., 480; 3 Mass., 230; 2 Florida, 118.

So that, without a constitutional provision, this law of 1857 would not have the effect of repealing the statutes and common in law force on this subject at the date of its passage. I have held, in an opinion already pronounced, that the Circuit Judges were ineligible by the Constitution to any such position. If so, this would present an insuperable objection to the proposed operation of this law. For if the provision be a nullity on this account, there will be obviously no will of the Legislature.

Some indeed, contend that the Circuit Judges are yet continued and vested with powers of the Justices of the Supreme Court under the Constitution, the Legislature not having (as they say) *otherwise provided*.

If this be so, a law imposing provisional duties is a nullity. It would seem too plain for argument, that when three Justices, constituting the Court, were elected and qualified, this was the "providing otherwise" contemplated by the Constitution, and effectually dispensed with

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further action under the temporary arrangement of the Circuit Judges. This subject was presented to two of the Justices at a term held in Marianna, on a motion to hear a case which was refused. It is not a little remarkable that the opinion overruling the application was prepared and delivered by a Judge who was not one of the Court, being the counsel of one of the parties—a fact almost incredible were it not distinctly admitted.—*Griffin vs. Orman* 5, Fla., 333.

If three, the whole number, be necessary to constitute the Court as is therein asserted, how can two, added to a third disqualified, supply the deficiency? According to their own doctrine, there was not a court to decide the motion—without a court there could be no decision. The same objection applies to the opinion pronounced on the occasion of calling in a Circuit Judge.—4 Florida 4. Thompson, Justice, here also wrote and delivered the opinion, although disqualified in nearly every case in which a Circuit Judge was called during the term.—See cases of *Ponder, Lines, Holbrook, &c.* The force of the objection, indeed, might be evaded in a degree if the law was correctly set forth in the opinion. The cases cited in support of the motion in *Griffin vs. Orman* are 2 and 8 East. and 6 Johnson. These I propose to notice very succinctly. The first was an appointment by two Justices of the Peace of overseers of a parish, and a subsequent appointment by two others to the same office. This latter was held bad, the first being declared a good execution of the duty.—2 East., 244. The other was a warranty by two out of five commissioners in bankruptcy, and the objection was that they did not sign together, but it was held good.—8 East., 319.

The remaining case was that of an objection to an award. The court says: "As this was a delegation of

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power for a mere private purpose, it is necessary that all should concur. In matters of public concern, a different rule seems to prevail. Then the voice of the majority shall govern."—6 John., 41.

Adequate investigation could scarcely have been given to the subject by the two Justices composing the Court, or they would have perceived the error of their conclusion as the presence of all the Judges and the opposition of these very authorities to the very doctrine they announced. Such is the decision which I am called upon to regard as authority. I am not insensible to the legitimate force of adjudication in the settlement, not alone of questions of property, but of other controverted points, whether legal or constitutional. It is a decision, however, possessing the attributes peculiar to the term—one in reality and not merely in form, which should receive such deference, and certainly the mere practice of the Court is not entitled to such consideration. If authority were wanted on the subject of the respect due to decisions of this character, it is to be found in the recent decisions of the Supreme Court of the United States on the subject of the Admiralty jurisdiction of their Courts above tide-water and on the lakes. Let the caution of adhering to authority be addressed to those to whom it justly applies, not to one struggling to sustain rule and principle, right and reason, precedent and practice, authoritative decisions of the Courts, and especially to preserve the Constitution and laws of the State from infringement and violation.

If what is claimed here be authority—if such meagre material, such misconception, can be permitted to overturn a rule and principle, the very basis of all republican governments, consecrated by the law in its earliest stages, by the decisions and practice of all the courts of all countries, the laws of the State and of all the States, and the

Constitution of the State, and nearly all of the States—a rule indispensable to right action, almost to the very existence of the Court itself—then, indeed, we may pause and enquire whether there is anything under the government which can be considered reliable or secure from invasion.

There is not here the specious apology given in *Milton vs. Blackshear* and other cases, for making a new law or rule by the Court, such a want of harmony in the authorities, a painful conflict, “a bewildering light.”—7th Flo., 157. Nor in the practical operation and effect of such a rule can any advantage be found; for, if in the case of a court made of two Justices and a Circuit Judge, a difference arises, one Justice and a Circuit Judge being for reversal whilst the other Justice is for affirmance, then there will be two Judges in favor of the judgment and two against it, counting the Circuit Judge who made the decision as one—a Justice of the Supreme Court and Circuit Judge on each side of the question—the very case in which, by the judgment of all courts, and especially of this, there should be no decision.—See *Frazier vs. Willy*, 2 Florida. This cannot exist with a court consisting of a majority of two Justices of the Supreme Court. The inconveniences and injury resulting from such a rule are stated with great force by those two distinguished writers and statesmen, Mr. Madison and Mr. Hamilton, in the *Federalist*. Although designed for legislative bodies, their remarks have also a pertinence and application to Courts of Justice.

“The necessity of unanimity in public bodies,” says the latter, “or of something approaching towards it, has been founded on a supposition that it would contribute to security; but its real operation is to embarrass the administration, to destroy the energy of government and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto to the regular deliberations of a

respectable majority. In those emergencies of a nation in which the goodness or badness, the weakness or strength of its government is of the greatest importance, there is commonly necessity for action. The public business must in some way be carried forward. If a pertinacious minority can control the opinions of the majority, in order that something may be done, a majority must conform to the views of the minority, and thus the sense of the smaller number will overrule that of the greater."—No. 22.

"It has been said," says Mr. Madison, "that more than a majority ought to have been required for a quorum, and, in particular cases, if not all, more than a quorum, for a decision. In all cases where justice or the general good require new laws to be passed, or active measures to be pursued, the fundamental principles of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority."—No. 58.

Disclaiming the imputation of unworthy motives, it will be readily seen that the same result would follow the non-attendance of a single Judge, from accident or other cause, in which event the business of the court would be obstructed and defeated, this great department of the government would be reduced to nonentity and perfectly paralyzed. Satisfied, for these reasons, that two Justices of the Supreme Court are authorized, under the Constitution, to hold the term, I propose to proceed to the transaction of the public business.

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Correction of the Record.

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AT A SUPREME COURT OF THE STATE OF FLORIDA, continued and held pursuant to adjournment, in the Capitol, in the city of Tallahassee, on Monday, April 14. A. D., 1859: Present, Hon. THOMAS BALTZELL, Chief Justice, Hon. C. H. DUPONT and Hon. B. M. PEARSON, Associate Justices, the following order was passed:

It appearing, from an inspection of the record, that two entries, bearing the semblance of orders, have been made upon the records of this Court in vacation and since the last adjournment thereof, the first of which purports to be a citation or summons, by authority of the Chief Justice only, as of the date of the 18th January, 1859, when no court was legally appointed to be held or actually in session, requiring the two Associate Justices of the court to attend at the court-room, in Tallahassee, on the 24th of the same month, to hold a term of the Court for the transaction of business, the second of which, of the same date, requiring the Sheriff of this court to take into his custody and bring before the Court, to abide the further order thereof, B. M. Pearson, one of the Associate Justices of the same, upon which two orders an irregular proceeding, in the nature of a process, was issued under the seal of the Court: Now, upon the actual assemblage of the court, and upon full and mature consideration of the premises, it is considered, ordered and adjudged that the aforesaid orders and all proceedings founded thereupon are without authority of law and of none effect, as if they had never been made or done, and that the same shall be considered as expunged from the records of this court; and to guard against the recurrence of similar errors in future, it is made a standing order of this court that no entries shall

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be made upon the minutes thereof in vacation and without the concurring authority and consent of a majority of the presiding Justices thereof, unless the same be for the adjournment or continuance of the legal terms of the same, or to effect the organization provided for by the 5th section of the act of 1851, organizing the Supreme Court.

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*In the matter of the order of the arrest of the Hon. B. M. PEARSON, Associate Justice, and in reply to the expunging resolutions adopted by the majority of the Court.*

1. A Court has full power and authority to enforce the attendance of its members.
2. The Judges are officers of the Court, and not above the law nor exempt from the compulsory process of the Court.
3. This power is not confined, as is alleged, to inferiors and subordinates, as Circuit Judges, Attorneys, Jurors, Witnesses, Justices of the Peace, Clerks, Sheriffs, &c.
4. It is inherent in the Court affirmed by statutes and its own decisions, and is indispensable to its very existence and preservation. The power does not pertain to the Chief Justice, but to the Judge or Judges present at the time called by law for holding the Court.
5. Rescinding and expunging resolutions or orders and protests are wholly unknown in judicial proceedings and not entitled to the sanction of Courts of Justice.

Opinion by BALTZELL, C. J.

In the latter part of last year, I received from Judge Pearson an official note, dated Jacksonville, 28th December, informing me, that "the condition of his eyes was such as to preclude him from doing justice to his official station and to himself, and requesting that a Circuit Judge be appointed to take his place." To this I made prompt and immediate answer, that, in my opinion, it could not be done consistently with official propriety." To this he

replied by letter, dated the 4th of January, acknowledging the receipt of mine, but expressive of "regret that his absence should work any prejudice to the right of parties litigant by virtue of your (my) decision, and would respectfully suggest *an adjournment until after the subsequent terms*, when I hope to be with you then."

The very proposal for the adjournment of all the terms appeared to me to indicate a purpose on his part to allow them to pass away without the transaction of the public business. It then became a matter of serious consideration what should be done under the circumstances. If there had been inability from sickness or other sufficient cause, I should have been the last to complain of his absence; but, as I conceived the cause alleged did not amount to a sufficient excuse, the infirmity being one that existed at the last terms of the court—not at all aggravated—not in the slightest degree increased. It commenced at Jacksonville and continued to prevail through the succeeding terms of the past year—at Tampa, Marianna and Tallahassee—with entire inability on his part to read a single word, a brief or authority cited, or write a single opinion; the labor of the entire term, with the exception of his sitting on the bench and joining in consultations, having thus been devolved upon his associates. The labor I was willing to have assumed again. There was an additional reason for not allowing his statement as a satisfactory excuse. If disabled or disqualified so as to make the appointment of a Circuit Judge legal and proper, his acting at all, whilst under the disability, was improper, as the decisions in which he concurred might for this reason be justly questionable or even deemed invalid. Moreover, he had assured his brother Judges, that in the event the infirmity continued, or was not relieved by the next term, he would resign. I had a full conviction, too, that the

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appointment of a Judge for the term was not only not provided for by the law, but prohibited by the Constitution. Still further desirous of satisfying myself, I inquired of citizens direct from Jacksonville, of the highest respectability and standing, as to his condition, and was informed that he was in better health than usual and engaged in his ordinary pursuits. The result of these inquiries was a belief upon my mind of a decided disregard and refusal on his part to perform the duty of his official station. In this connection, it is important to notice the action of the court at this period. The third of January being the first Monday, was the day fixed by law for holding the Supreme Court at Tallahassee. On that day was present the C. Justice; on the 4th, the C. J. and Associate Justice DuPont. The Court was then adjourned until the 11th, when the C. J. was present. On the 12th and 13th he was present alone. On the latter day, the court was adjourned to the 17th. On the 18th, present the Chief Justice, when an order was made to notify the two Associates to be present on the 24th, with a further order for the attachment of the Hon. B. M. Pearson. On the 24th, present the C. J. and Associate DuPont, when the C. J. proposed to proceed with the business, but Associate Justice DuPont not concurring, the Court was adjourned to the Court in course.

It will thus be seen that no term was held for the transaction of business, owing to the failure of one Associate to attend and of the objection of the other to proceeding with the business in the absence of that Associate, and thus a high co-ordinate department of the government, vested with the most important powers for the preservation of the public peace, of social order, of the administration of justice, was about to be rendered totally inefficient by this suspension of its vital functions.

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To me above all others, occupying the responsible position of presiding officer, the question addressed itself with irresistible prominence and force whether there was not power in the Court itself, for redress in such emergency, or was the tribunal wholly impotent and powerless. I deemed it due to those who, in a generous confidence, had reposed in me so high and sacred a trust—to my own deep sense of responsibility—to the integrity of the Court, the character of the State, the maintenance of the government itself, that a remedy, if any existed adequate to the occasion, should be applied. In a matter of such serious moment all merely personal consideration, either in reference to others or to myself, did not, as they were not permitted to, have the slightest weight. The question was one, indeed, affecting the very existence of the Court. There was no time for investigation, nor search for precedents, but the event made it incumbent on those having control of the matter to use the means within their reach, without regard to nice and arbitrary distinctions. To save, to rescue from peril, confers extraordinary power. Resources then, are the suggestions of the occasion, and when resorted to in questions of great moment, are not objectionable that they are not of ordinary application. It was easy to see, that if one Judge could by his absence from court, impede its progress, arrest its action and subvert its power, the great object of its institution would be defeated. Even when present, he could effect the same purpose by contumelious behavior, refusing to sit in conference—to vote in the trial of cases and by other expedients. He would thus be armed with the power, to be wielded at his own will, of attacking the Court, obstructing its proceedings, of threatening its action, defying its authority, and assailing it at every step, and this department would thus be exhibited stripped of its legitimate



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power and defenceless before one of its own members. Such results would be in direct conflict with the established maxim that every department of the government possesses inherent power adequate to its own protection and fully commensurate to the objects of its creation.

This principle was the basis of the decision of the great case of *Cohens vs. the State of Virginia*, in which the important question arose whether a sovereign State was subject to the jurisdiction of the Federal Courts. That profound and distinguished jurist, C. J. Marshall, delivered the opinion of the Court. It presents so many views coincident with those we have expressed that we make copious extracts, in order to show the analogy :

“The questions presented to the Court by the two first points made at bar are of great magnitude, and may be truly said vitally to affect the Union. This excludes the enquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review and maintain; that admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably and by authority of law any attempt which may be made by a part against the legitimate powers of the whole, that the government is reduced to the alternative of submitting to such attempts of resisting them by force.

“The jurisdiction of the Court, then, being extended by the letter of the Constitution all cases arising under it, or under the laws of the U. S., it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim in the spirit and true meaning of the Constitution; which spirit and true meaning must be so apparent as to overrule the

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words which its framers have employed. It was contended that a State was sovereign and therefore not suable nor subject to the jurisdiction of the Federal Courts. While weighing arguments," said the Court, "drawn from the nature of government and from the genial spirit of an instrument and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in opposite scale those principles drawn from the same source which go to sustain the words in their full operation and import. One of those which has been pressed with great force by the counsel for the plaintiffs in error is, that the judicial power of every well constituted government must be *co-extensive with the legislative*, and must be capable of deciding every judicial question which grows out of the Constitution and laws.

"If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would probably exist no contrariety of opinion respecting it. Every argument proving the necessity of the department proves also the propriety of giving this extent to it. The mischievous consequences contended for on the part of Virginia are also entitled to great consideration. It would *prostrate*, it has been said, *the government and its laws at the feet of every State in the Union*. The laws must be executed by individuals acting within the several States, and if these may be exposed to penalties, and if the Courts of the Union cannot correct the judgments by which they may be enforced, the course of government may at any time be *arrested by the will of one of its members*. *Each member will possess a veto on the will of the whole*.

"We readily concur with the counsel for defendants in the declaration, that the case which has been put of direct legislative resistance for the purpose of approving the ac-

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knowledge powers of government are extreme cases, and in the hope that they will never occur, but we cannot help believing that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would *contribute* in no inconsiderable degree to their *occurrence*." Alluding to subjects that might be expected to produce collisions: "Those collisions may take place in times of no extraordinary commotion. But a Constitution is formed for ages to come and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always, be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen *if they have not provided it, as far as its nature will permit, with the means of self preservation from the perils it may be destined to encounter.* No government ought to be so defective in its organisation as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of Justice are the means most usually employed, and it is reasonable to expect that government should repose on its own Courts rather than on others.

"It is very true, that whenever hostility to the existing system shall become universal, it will also be irresistible; the people made the Constitution and the people can unmake it. It is the creation of their will, and lives only by their will. But this supreme and irresistible power to make or unmake resides *only in the whole body of the people, not in any subdivisions of them. The attempts of any of the parts to exercise it is usurpation and ought to be repealed by those to whom the people have delegated the power of repelling it.*"—Cohens vs. Virginia, 6 Wheaton, 264. Language more pertinent and apposite to the very case under consideration, and to the objections to the

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power exerted here, could scarcely be found—the subject of the exercise of the jurisdiction a great State, no precedent for the exercise of the power, its basis and support the great principle of self-preservation and the duty of repelling through the inherent functions of the department of all assaults made upon it. These should be carefully kept in view in considering the legality of the present action, which we now propose to consider in this restricted point of view as to the authority to compel the attendance of the absent officer.

It is not denied that compulsory process may be issued against other officers of the Court—the Clerk and Sheriff, Jurors, &c. The power is full, ample and complete as to them—not so as to the Judges, who are said to be exempt from all action of this kind. If this be so, certainly some authority will be found in the books to sustain such distinction. I have not been able to find it in my researches. The law conferring the power is to this effect: “*All officers* are punishable for corrupt and oppressive proceedings, according to the nature of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their office, &c.—6 Mod., 96. But, besides the punishment by indictment, &c., *all Courts* have discretionary power over *their officers*, and are to see that no abuses are committed by them which may bring disgrace on the courts themselves.—4th Jacob’s Law Dict. tit. Off. 440. In general, *all wilful breaches* of the duty of *an office* are forfeitures of it, and punishable by fine, &c., for since every office is instituted, not for the sake of the office but for the good of some other, nothing can be more just than that he who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both willing and able to take care of it, and that he should

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be punished for his neglect or oppressive execution," &c. *Ibid.* 441.

To the same effect is the law laid down in Blackstone's Commentaries: "To this head of summary proceedings may be properly referred the method immemorially used by the Superior Courts of justice of punishing contempts by attachment and the subsequent proceedings thereon. The contempts that are thus punished are either direct, which openly insult or resist the powers of the Courts or the persons of the Judges who preside there, or else are consequential, which, without gross insolence or direct opposition, plainly tend to create a universal disregard of their authority. The principal instances of either sort that have been usually punishable by attachment are chiefly of the following kinds: those committed by inferior Judges and Magistrates (for causes stated,) by sheriffs, bailiffs, goalers and other officers, by attornies and solicitors, by jurymen, by witnesses, by parties to any suit or proceeding before the Court. Some of these contempts may arise in the face of the Court, as by rule and contumelious behavior, by obstinacy, perverseness or prevarication, &c. others in the absence of the party, as by disobeying and treating with disrespect the king's writ, *or the rules or process of the Court, &c.*, and by anything in short that demonstrates a gross want of that regard and respect which, when once Courts of justice are deprived of, their authority (so necessary for the good order of the kingdom,) is entirely lost among the people."—4 Blackstone, 285. "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the Supreme Courts of justice to suppress such contempts, by an imme-

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diate attachment of such offender, results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our laws extend; and though a very learned author seems inclinable to derive this process from the statute of Westmin. 2, 13th Ed., 1, (which ordains that in case the process of the King's Court be resisted by the power of any great man, the Sheriff shall chastise the resisters by imprisonment, and if the Sheriff himself be resisted, he shall certify to the Court the names of the principal offenders, their aiders, consenters, commanders and favorers, and by a special writ judicial they shall be attached by their bodies to appear before the Court, and if they be convicted thereof, they shall be punished, etc.,) he afterwards more justly concludes that it is a part of the law of the land and as such is confirmed by the statute of Magna Charta.

"If the contempt be committed in the face of the Court, the offenders may be instantly apprehended and imprisoned at the discretion of the Judges, without any further proof or examination. But in matters that arise at a distance, and of which the Court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, they either make a rule to show cause why an attachment should not issue against him, or in very flagrant instances of contempt, the attachment issues in the first instance."—4 Black., 286.

Thus by distinct declaration, without exception of any kind, *all officers* are punishable by attachment, and *all Courts* are bound to punish their officers for neglect of duty or other unbecoming conduct, either openly in Court or out of it. The only escape from such conclusion is, that the Judges are not officers or that each member constitutes

*the Court* so that he can prevent such action of the Court upon himself.

Each of these positions is alike untenable. Judges are in law treatises styled officers, chief officers of the Courts, and the Court consists of a majority of the Judges, if so many are present, and if not such as are present at the time and place fixed by law for holding its terms. This much we ascertain from the authorities cited that there is no distinction as to any offences committed by any officer—no exemption—all are embraced—all subject. Why make such exception to defeat the very object and purpose of the law? Why, if Judges commit offences prohibited by the laws, should they be exempt from their operation? Does their office give them power and capacity or the right to break the law with impunity? Are they exempt in other instances for injuries of a civil character, or for offences in a criminal point of view? If so, let it be known. They may be suitors and sued in all the Courts, from a Justice of the Peace to the Supreme Court, and the process of execution may go from this very Court to its officers to execute its mandates against either of them. If the exemption applies in the one instance, why not in all? How the creation of an office to administer the law can give immunity to the officer to disregard it, is difficult to conceive. Judges, so far from being exempt under the English laws, have, from the earliest period of English history, felt the weight of the criminal law in its severity. Thus, in the year 1295, heavy punishments were inflicted upon almost all the king's justices, even the most able. Sir Ralph Hingham, C. J., of the King's Bench, was said to have been fined 7,000 marks; Sir Adam Stratton, Baron of the Exchequer, 34,000.—3 Black., 410; Hume's Eng. 375.

The expressions, "which openly insult or resist the

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powers of the courts or the persons of the Judges who reside there," quoted from Blackstone, have reference to rules and principles established and recognized by the common law of England to the effect that "where there are divers Judges of a court of record, *the act of any one of them* is effectual, especially if their commissions do not expressly require more. Thus it appears that at common law each Judge has the *full judicial authority, unless he be expressly required to exercise it in conjunction with others*, as in the quorum clause of the commissioners in England."—Hawkin's Pleas of the Crown, Chap. Crim. Juris. This was relied upon by that eminent jurist, C. J. Ruffin, of the Supreme Court of North Carolina, to prove his position "that the common law deems it of such high consequence that the *judicial power shall never be suspended*, but that the tribunals of justice should at every term be always open to suitors, that *it adopted the principle that each one of the several Judges of a Court may hold it.*"—4 Ire. L. R. 447.

It is not maintained that one Judge of the Supreme Court of the State is competent to hear and determine causes; far from it. The Constitution, declaring that "a majority of the Judges shall hold the sessions of the Supreme Court," and the law of 1845 "that three of the Justices (at that time a majority of the court,) shall be a quorum to do business," equally forbid it; yet there is nothing which forbids his sitting to effect an organization of the court. The 5th section of the act to organize the Supreme Court provides, "that if any one or two of the Justices are disqualified or disabled from hearing or determining a cause or causes, it shall be the duty of the Justices of the court to notify any one or two of the Judges of the Circuit Court to attend and try and hear the said causes."

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Now, obviously if two of the Circuit Judges be disqualified or disabled the power of appointment devolves upon the remaining Justice who constitutes the court for that purpose, and his duty is to give the notification required. Such has been the practice of the court. The rescinding order passed by my Associates is as follows: "To guard against the recurrence of similar errors in future, it is made a standing of the court that no entries shall be made upon the minutes thereof in vacation and without the concurring authority and consent of a *majority of the presiding Justices* thereof, unless the same be for the *adjournment or continuance* of the legal terms of the same, or to effect the organization provided by the 5th section of the act of 1851, organizing the Supreme Court."—See Minutes.

The power is conceded to less than a majority to adjourn and continue the legal terms or to effect the organization above alluded to, and thus is surrendered the entire question, in our conception; for, if the Circuit Judges disobey the order of the Justice notifying them to attend, they are clearly liable to attachment for disobedience to the order. The quotations already made from Blackstone establish this. Amongst the contempts enumerated are, "the disobeying or treating with disrespect the king's writ or the rules or process of the court."—4 Black., 284. To the same effect is the decision of this court in the case of Mitchell vs. Maxwell, in which the means of executing the law not being provided by it, the court said: "The law is well settled, that whenever a power is given by statute, everything necessary to make it effectual is given by implication; for the maxim is, *quando lex aliquid concedit concedere videtur et id per quod devenitur ad illud*."—2 Florida, 597, citing 1 Kent's Com., 465, &c. They therefore ordered the arrest of the citizen in case of his refusal

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to answer as required. A single Judge having power to pass the order has power to enforce it. There is the authority of the Legislature with the additional sanction of the court itself. A like result would follow from the conceded power to one Judge to adjourn and continue the terms, which is a power likewise for purposes of organization, and carries with it the power of fine and imprisonment to prevent contempts of the court in the execution of the duty.

With a power admitted for purposes of organization—with power to compel the attendance of a Judge or Judges, although of the circuit, to effect this purpose, it would be difficult to resist the existence of the power to the full extent of organization. A power for a particular purpose is to effect that purpose, and the means are given adequate to the end. A power for the partial and not entire accomplishment of a purpose—to be exerted against some and not all the members of a court—would be unheard of. Nor is it an answer to say that the order is addressed to the Circuit Judges and the compulsory power is confined to them alone. By no means. The notification makes them Judges of the Supreme Court *pro hac vice*, and it is for their refusal to attend and perform the duty which the law enjoys as Judges of the Supreme Court that they are to be held as in contempt. I have been asked, if the Chief Justice were absent, would the power exist to send for him? I answer unhesitatingly in the affirmative. It is vested in the Judge present and performing his duty, against all delinquents.

But the proceeding is harsh and unequal. It is not usually so considered when exercised by the Judges against other officers. It is every day's practice to proceed against sheriffs, clerks, jurors, attorneys and witnesses. So, too, in Congress and in the Legislature, to send for absentees in

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case of a quorum not being present. In case of the Senate of the United States or our own State Senate sitting as a high court for the trial of an impeachment, no doubt could exist of their right to send for absent members, if needed for purposes of organization or other official action. The very fact of the frequent use of this power for this purpose by other deliberative bodies, without complaint, satisfactorily establishes the propriety of its use and is a full answer to all complaints of hardship and oppression.

The rule, it is said, should not apply to Judges of the Supreme Court, because they are the equals of each other, and neither can force the other to the performance of official duty. That a Judge refusing to attend court is the equal in power of the one holding court in pursuance of law, may not be maintained any more than that an officer or soldier who refuses to go into battle is the equal in any respect of one who is found at his post discharging his duty. Besides, compulsion is in no degree dependent upon station, nor is it a consequence of a difference in position. Very far from it. The different officers of government are all equal in the eye of the law. They may have different parts to perform, yet, with duty discharged, each is the equal of the highest—none inferior, unless he makes himself such by delinquency or conduct making compulsion necessarily applicable to him. The citizen in his natural capacity—the true sovereign and source of all power—was above law before entering into government, had the highest position, and yet he subjects himself to law, confiding his high powers to officers and requiring of them the enforcement of duty even against himself. To be above and beyond and exempt from law was the impotent claim of the worst of the kings of England and has no place in a government where all are equal before the law.

But, again, it is urged that impeachment is the true

remedy. Why so? Why fine and imprison in any case? Why not resort to that remedy in all cases? The distinction is most obvious. Impeachment removes the officer, attachment compels the performance of duty. A sheriff, clerk or other officer may be fined, whilst the remedy by impeachment would be unsuitable.

It is said, however, that in the instance of exertion of power by other bodies, there is an express grant, and, where this is the case, none can be implied. There will be found to be a mistake in this respect. In the case *ex parte* Henderson, the very point was considered and disposed of by quoting the opinions, on the same subject, of the Supreme Court of the United States. "It did not suit the purposes of the people in framing this great charter of our liberties (the Constitution of the U. S.) to provide for a minute specification of its powers or to declare the means by which these powers should be carried into execution. A Constitution which should contain an accurate detail of all the minute subdivisions of which its great powers will admit and of all the means by which they may be carried into execution, &c., would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." 2 Florida 293. quoting *McCullough vs. Maryland*, 4 Wh., 407.

In *Anderson vs. Dunn*, the subject was still more particularly considered, in a case as to the power of the House of Representatives of the United States to punish for a contempt. It was expressly admitted that there was no power given by the Constitution to either House to punish

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for contempt except when committed by their own members; nor did the criminal or judicial power given to the United States in any part expressly extend to the infliction of punishment for a contempt of either House or any one co-ordinate branch of the government, yet the Court held that "there is not in the whole of that admirable instrument a grant of powers which does draw after it others, not expressed, but vital to their exercise, not substantive and independent, but auxiliary and subordinate." But if there is one maxim which necessarily overrides all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interest and dignity of those who created them require the exertion of the powers indispensable to their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. That the safety of the people is the supreme law not only comports with but is indispensable to the exercise of those powers without which that safety cannot be guarded." They decided that the power existed by implication from necessity and on the principle of self-preservation.—See 6 Wheaton, 204.

By the Constitution of our State, the judicial power of the State, both as to matters of law and equity, is vested in the Courts. What is a power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? The use of means to execute a power granted results by necessary and unavoidable implication from the very act of establishing a government and vesting it with certain powers; for, wherever the end is required, the means are authorized. "If there be any general principle which is inherent in the very definition of government and essential

to every step of the progress to be made by it, it is that every power vested in a government is in its nature sovereign and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the end of such power unless they are excepted in the Constitution or are inimical or contrary to the essential objects of society."—3 Story's Com. on Constitution, p. 117, §1,240.

Unless we are greatly mistaken in the weight to be given to the law and authorities cited, the power exercised on this occasion is fully sustained, as well by express provision of the common law of England, the statutes of the State, the sanction and decisions of this Court itself and the decisions of other Courts of the highest respectability, and clearly given by implication,<sup>7</sup> and has not the opposing declaration or opinion of a single text-book, rule or principle of law, or of a single judge or jurist.

I have the satisfaction to know that no indignity has been committed—no injury inflicted—no wrong done. The officer sent upon the mission performed his duty with all due respect and discretion, having upon his arrival at Jacksonville found the Judge apparently well. He informed him of the mandate, but forbore its execution, and on the morning fixed for his departure, the Judge being indisposed, he returned without him.

The terms of the Court have been since held and not adjourned, and the public business transacted and parties litigant no longer kept waiting; for, although the infirmity of the eyes has continued almost to the same extent, the Judge not having been able to read, yet there has been such an improvement as to enable him to write. Thus has this action, which the majority have assumed to condemn, been instrumental in preventing the delay of justice, and in maintaining the efficiency of this

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department of the government; and whilst my associate has not been molested nor disturbed, the moral force of the movement has been equally influential and effective.

Let the other side of the picture be presented, and suppose no action in the premises had been taken, but the presiding officer of the Court had remained in passive acquiescence, no terms held and nothing done, and it had been taken for granted that the Court could be rendered impotent whenever one of its members should determine not to join in its councils or obey its summons, or at his pleasure stay away, could public esteem in the institution have been any longer commanded, or would it not have deservedly lost all rightful claim to public confidence and respect as a co-ordinate department of the government? Having been the first to assert this power, as the representative of the Court, over an Associate for neglect of duty, I shall also be equally ready, under the like circumstances, to submit without question should the Court conceive it proper to exercise the same power over myself, and should feel humiliated to assert it as claimed against inferiors and subordinates only. Some notice is due of the action of the Court and a member of it after the award of the attachment. On the day fixed for the attendance (24th,) Justice DuPont entered a protest as well against the order of arrest as that of notification, committing himself beforehand to the condemnation of the measure. The two Associates, at the close of the session, at Tallahassee, entered an order, upon full and mature consideration, that this order "*be considered as expunged from the records of the Court.*" With due respect, such action is wholly unknown to intelligent Courts and without warrant or authority. Protest, in legal language, is a legislative act or the document of a captain asserting damage or injury to his vessel. The term expunging has been used by legislative bodies very

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rarely, as in the House of Commons in England in the case of Wilkes, with due deference improperly introduced into the Senate of the United States on the occasion of the protest of President Jackson, whose fame was not in the slightest advanced by the measure. My Associate DuPont is quite indignant that I have regarded the order as an act of censure. His error will probably be corrected by the remarks made by Mr. Webster and Mr. Calhoun during that memorable period. Thus the former: "That which made this resolution which we have now amended particularly offensive was this—it proposed to expunge our journal. It called on us to violate, to obliterate, to erase our own records. It was calculated to fix a particular stigma, a peculiar mode of reproach or disgrace on the resolution of March last. It was designed to distinguish it and reprobate it in some especial manner. The attempt to induce the Senate to expunge its journal has failed, signally and effectually failed. The record remains, neither blurred, blotted nor disgraced." This was on its rejection. Afterwards, on the occasion of its passage, Mr. Calhoun said: "No one, not blinded by party zeal, can possibly be insensible that the measure proposed is a violation of the Constitution. The Constitution requires the Senate to keep a journal, this resolution goes to expunge the journal. The Constitution says the journal shall be kept, this resolution says it shall be destroyed. They tell us that the resolution on your records is not to be expunged, but is only to be *endorsed expunged*. Really, sir, I do not know how to argue against such contemptible sophistry. You are going to violate the Constitution and you get rid of the infamy by a falsehood. You yourselves say that the resolution is expunged by your order—yet you say it is not expunged. You put your act in express words—you record

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it and then turn round and deny it," &c.—I Benton's 30 years, 550, 728.

Such is the act which my associates have thought worthy of imitation in a court of justice, the Supreme Court of the State. In other respects, the reference is an unfortunate one for them. None of the actors in that scene ever failed or refused to discharge a public duty, nor were they at any time the apologists of a known delinquent. The names of Jackson, of Calhoun, Clay and Webster, even of Benton himself, are free from such reproach.

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**ACTION.**—An action of assumpsit is not maintainable by a ward against his guardian, or quasi guardian, the parent. The remedy is by action of account or bill in equity, in which the equities between the parties may be adjusted and rightfully settled.—*Linton vs. Walker*, 144

**ADMINISTRATOR.**—Where a defendant, after the service of process in a suit instituted against him, died, and the plaintiff afterwards and before the expiration of the time limited by statute for the presentation of claims to the administrator, asked for and obtained an order for a *sci. fa.* to make the administrator a party: Held, that the order thus obtained is equivalent to and dispenses with an actual presentation of the claim.—*Ellison vs. Allen*, 206

When an administratrix conveys the property of her intestate in a deed of marriage settlement in her own name and right, the deed is absolutely void and the title remains in the estate. But *quere* as to the effect it might have on the validity of the deed if the administratrix was found to be in advance to the estate at the time of making the deed to the full value of the assets conveyed.—*Broome et al. vs. Alston, adm'r*, 307

**AMENDMENT.**—Where an amendment in matter of form is allowable, this Court will give to the party entitled to the amendment the full benefit of it, as though it had been actually made.—*McKay vs. Friebele*, 21

**APPEAL.**—(See Writ of Error.)

**ASSUMPSIT.**—(See Action.)

**ATTORNEY.**—In a conflict between the lien of attorneys upon a judgment recovered by them and the equitable sets-off of the judgment debtor, the Court will not undertake to determine arbitrarily what amount of professional aid was necessary to prosecute the suit to judgment. Yet it will interfere so far as to confine the claims of the attorneys for services within the limits of a just and reasonable compensation.

An attorney has a lien upon a judgment, for his services in obtaining the same, superior to any equitable sets-off of the judg-

ment debtor. The case of *Carter vs. Bennett* (Florida Reports) noticed and approved.—*Carter vs. Davis*, 139

**BAILMENT.**—The bailee of a slave upon hire is bound to bestow that degree of care and attention which a humane master would bestow on his own servant under like circumstances.—*Tallahassee Railroad Co. vs. Macon*, 289

**BILL OF EXCEPTIONS.**—Where the instruction of the judge below is relevant to the issue joined, and exception is taken there to, all the evidence upon which the instruction is based, must be incorporated in the bill of exceptions which accompanies the record.

In a common law suit, the only means of bringing before the Appellate Court the evidence used in the Court below, is by incorporating it in the bill of exceptions which accompanies the record.

It is a settled rule of law that every presumption is in favor of the ruling of the Court below, therefore where a party excepts to such ruling, and fails to bring up the evidence upon which the ruling is based, this Court will refuse to consider the exception.—*Burk vs. Clark*, 9

Where the error assigned is the refusal of the Court below to grant a new trial, in order to enable this Court to judge of the correctness of that ruling, all the evidence used at the trial must be brought up by a bill of exceptions.—*Tompkins vs. Eason*, 14

Where exception is taken to an instruction given by the judge below, it ought with the evidence upon which it is based, to be incorporated in the bill of exceptions accompanying the record.

Where the instruction complained of has not been incorporated in the bill of exceptions, but, as presented by the record purports to have been in writing, duly attested by the signature of the judge who presided at the trial, if the same be manifestly irrelevant to the issue joined between the parties and calculated to mislead the jury, this Court will consider and pronounce upon it.—*Fash vs. Clark & Ferris*, 16

Where exception is taken to a particular instruction which is within the limits of and relevant to the issue joined, the evidence upon which the instruction is based must be fully and properly presented in the record.

The only mode of bringing up to this Court the evidence used below in a common law suit, is by incorporating it into a "bill of exceptions," duly attested by the signature of the judge, or of three by-standers, as is prescribed by the statute.—*McKay vs. Friebele*, 21

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Where there is no bill of exceptions accompanying the record, but the instruction complained of purports to have been in writing, duly attested by the judge who presided at the trial, and it is manifestly irrelevant to the issue joined between the parties, this Court will consider and pronounce upon such instruction.—*McKay vs. Bellows*, 21

The Court will not reverse a case where the facts are not presented by a bill of exceptions, or there is an agreed case made in the Court below.—*Price vs. Sanchez*, 128

CHARTER PARTY.—A charge is not proper for detention of a vessel to take on board freight where the charter party provided for its being taken free.—*Pearson vs. Grice*, 214

CHILD'S PART.—(See Dowress.)

CITY.—(See Corporation.)

CONSIDERATION.—A partial failure of consideration is made matter of defence by statute.

A sale of State land by a trespasser confers no right, no title, and is no consideration for a note given for it.—*Stafford vs. Anders*, 24

When a promissory note has been negotiated before due, under circumstances which, at common law, would authorize an inquiry into the consideration thereof, the same inquiry may be made under a plea of failure of consideration, filed on oath, under the statute.

Where the failure of consideration of a promissory note is filed under oath, according to the statute, the statute throws the *onus* of proving the consideration thereof upon the plaintiff.—*Prescott vs. Johnson*, 291

CONSTRUCTION.—It is a rule in construing statutes, that the original act and the amendment is to be viewed as one act, and that no portion of either is to be declared inoperative, if they can be made to stand together without wresting the words from their appropriate meaning.—*Harrell vs. Harrell*, 48

Where the provisions of an act are adopted by a *general reference*, the act will receive a more liberal construction than if originally passed with reference to the particular subject.

Where a statute has been enacted with special reference to a *particular* subject and by another statute its provisions are directed *in general terms* to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that

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the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the ~~new~~ subject.—Jones vs. Dexter, 278

CONTRACT.—Where one contracts to purchase real estate and proceeds to erect improvements thereon, if compensation therefor be decreed him, the ~~amount~~ is to be based upon the actual value of the improvements, or at farthest, upon a *reasonable allowance*, and not upon the amount expended.—Gliniski & Gilliland vs. Zawadski, 485

The rule that, on discovery of a fraud in a contract, the defendant should abandon and avoid claiming benefit by it; and, in case of a sale of goods, on discovery of unsoundness, that a return should be made by the vendee, is undoubted and indisputable, but not applicable to cases of sale of property of no value and when the subject purchased is not rightly an article of sale or of merchandize.—Hancock, adm'or, vs. Tucker, adm'r, 431

(See Corporation.)

CORPORATION.—The law of 1856, to benefit commerce, was not designed to give to the original proprietor of a city, or to the vendees of his right to the streets, the land between high and low water mark at their termination. By the law, this belongs to the city so long as the street exists, with a right to the owners of lots afterwards on its abandonment.

Wharves may be constructed by a city, either by direct construction on its own part or by contract with others, giving them the revenue for a period of time to compensate for the erection.

An injunction refused, under the circumstances of this case, to the erection of a railroad and wharf.—Geiger et. al. vs. Filor et al., 325

Where a party is sued to recover assessments upon his shares in an incorporated railroad company, it is inadmissible to allow oral testimony to be given at the trial as to the *inducements* and *circumstances* which led to the subscription and the *understanding* of the subscribers when they subscribed, unless such testimony goes to establish *fraud* or *mistake*.

Where, in such a suit, the defence is that the corporation has accepted from the Legislature an amendment which radically alters the original charter, to constitute this a good defense, the defendant must show affirmatively that he *dissented* from such alteration in a reasonable time, before any debts have been contracted or rights have accrued to third parties under such alteration; and it is not incumbent upon the corporation to show his *assent* in order to be able to maintain the action.

Where, in the body of the subscription, there is a stipulation for a particular enterprise, as for the building of the road to a particular place, or for its location upon a specified route, such stipulation forms a *condition precedent*, and unless strictly complied with by the corporation, the party subscribing will be absolved from his obligation to pay.—*Martin vs. Pensacola and Georgia R. R. Co.*, 370

In the construction of road beds for a railway, a substantial *bona fide* compliance with the terms of the contract in the execution of the work should be insisted on, and is no excuse that a portion of it may be executed at a trifling expense—at the cost of a few dollars. Completion is the word, as near as may be, and the engineer is inexcusable in allowing a mere formal completion with the contract.

A party is not entitled to compensation where his work is completed by another, he having abandoned and left it unexecuted.

By the terms of this contract, the work was to be done to the satisfaction of an engineer of the road. This is an appropriate engagement and will be enforced and carried into execution by the Court, and whilst his certificate will not be regarded as conclusive and unassailable, yet it will be, without fraud or special showing to avoid its effect.

Courts of equity will give relief in such cases as a general rule, nor are Courts of law impotent to give it in a proper case.

A plea in abatement, that by the agreement the Chief Engineer should in all cases decide every question which might or could arise under the contract, is not maintainable. If pleadable, it should be in bar.—*Finegan & Co, vs. L'Engle & Son*, 413

**CRIMINAL PROSECUTIONS.**—Under the provisions of our statute, the defendant in a criminal case has a right to the concluding argument before the jury, when he introduces no testimony on the trial.

The statute which secures to the defendant in criminal cases the right to the concluding argument, is mandatory in its character, and a denial of the right by the Court may be the subject of a bill of exceptions.—*Heffron vs. The State*, 73

**DECREE.**—Where a bill for account is brought against a guardian and the sureties on his guardian bond, the final decree, if for the payment of money, should be so framed that it shall be enforced against the sureties only in the event that the money cannot be made out of the principal.—*Hendry vs. Clardy*, 77

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By a rule of this Court, no final or interlocutory decree shall be entered up without notice to the parties.—*Broome et al. vs. Alston, adm'r*, 397

**DEFAULT.**—A defendant against whom a default has been taken for want of a plea is not absolutely out of Court, but still retains the right to appear upon an inquest of damages, to cross-examine the plaintiff's witnesses, to introduce evidence in mitigation of damages and to address the jury thereupon.—*Watson vs. Seat & Crawford*, 486

**DELIVERY.**—A sale of personal property, as of hogs, is not complete without delivery, identification or discrimination, and it is the duty of the vendor to make this, unless otherwise agreed.

A plea setting up a sale of 58 head of hogs, with a delivery of 25 and refusal to deliver the remainder, was held a valid defence as to those not delivered, and, if there was fraud in procuring the note, no recovery could be had upon it.—*Stafford vs. Anders*, 24

**DEMURRER.**—Where the demurrer is to be the whole declaration, and it is found to contain one good count, the judgment on the demurrer must be for the plaintiff.—*McKay vs. Frieble*, 21

Where a plea in bar to the original bill has been sustained upon demurrer, a supplement bill, filed afterwards, and before the final decree, confessing and avoiding the matters set up in the plea as a defence, ought to be answered by the defendant, and it is error to dismiss it upon demurrer.—*Hendry vs. Clardy*, 71

If a party, after judgment upon demurrer is given against him, goes on to amend his pleadings and make an issue to the country, he thereby waives his exceptions to the judgment upon the demurrer, and will not be permitted to assign it for error in the Appellate Court.—*Ellison vs. Allen*, 206

It is a well settled rule of practice, both in the English and American Courts, that on demurrer the Court will consider the whole record and give judgment for the party who on the whole appears to be entitled to it.—*Miller & Criglar vs. Kingsbury*, 255

Where any of the pleadings of either party is pronounced insufficient upon demurrer, and the party against whom the ruling is made proceeds to plead over, the act of pleading over is a waiver of his exception to the ruling, and the point will not be considered in this Court. If he desires to avail himself of the exceptions, he must rest upon the ruling and make that the ground of his appeal or writ of error.—*Hooker vs. Johnson*, 453

DESCENTS.—The act of 1838, which adopts the provisions of the law regulating descents as furnishing the rule for the distribution of personal estate, was intended to refer to any law of descents which might be in force at the time that the right to the distribution might become vested.

The two *provisos* contained in the act of 1839 regulating descents, and which constitute paragraphs ten and eleven of section one in Thompson's compilation, *do not apply* to the distribution of *personal* estate of an infant dying under the age of twenty-one.—*Jones vs. Dexter*, 376

DISTRIBUTION.—(See Descents.)

DOWRESS.—Where a widow elects, under the provisions of the act of 1838, to take a "child's part" in the estate of her deceased husband, if there be no child, she takes one-half of the real estate in fee simple and a like quantity of interest in the personality, including slaves, absolutely.—*Harrell vs. Harrell*, 46

EVIDENCE.—In a presentation for assault and battery, it is competent for the defendant, both at common law and under the statute of this State, conferring upon the jury the right to fix the measure of punishment within certain limits, to give in evidence his general good character, although the same may not have been assailed by the prosecution.—*Hance vs. The State*, 56

In the case of the Circuit Judge not remembering as to the admission of evidence about which there is doubt, means should be taken to ascertain the truth, if practicable, by examination of witnesses or other appropriate mode.—*Pearson vs. Grice*, 214

Where a party is sued to recover assessments upon his shares in an incorporated railroad company, it is inadmissible to allow oral testimony to be given at the trial as to the *inducements* and *circumstances* which led to the subscription and the *understanding* of the subscribers when they subscribed, unless such testimony goes to establish *fraud* or *mistake*.—*Martin vs. Pensacola & Georgia R. R. Co.*, 370

Where the failure of consideration of a promissory note is filed under oath, according to the statute, the statute throws the *onus* of proving the consideration thereof upon the plaintiff.—*Prescott vs. Johnson*, 391

On the trial of a suit instituted to recover the price of cattle sold, as witness was asked whether he did or did not have a stock of cattle running with the stock of Alderman Carlton, known as the James E. Hendry stock, and whether or not it was formerly of

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the same stock: Held, the question was inadmissible.—Parker et al. vs. Hendry, adm'r, 490

EXECUTION.—A Circuit Judge, under the provisions of the act of 1844, has full power, either in term time or vacation, to correct, restrain and control an execution, and no resort is necessary to the powers of the Court of Chancery in such cases, unless arising from the operation of independent equities apart from the process.—Robinson vs. Yon, 350

FAILURE OF CONSIDERATION.—(See Consideration.)

FRAUD.—Where a promissory note had been given for the purchase of a horse, which note was afterwards transferred to a third party, who brought suit thereon against the maker, and the pleas were "failure," "partial failure" and "want of consideration," it is error in the Judge below to instruct the jury, "that to sustain the defendant's plea of *fraud*, it must be proved to them that there was fraud by the payee of the note; in the sale of the horse to the maker; and that there was fraud between the assignee and payee of the note, in the purchase of the note; and that it must be proved that the assignee was notified of the fraud between the payee and the maker in the sale of the horse before he purchased the note."—McKay vs. Bellows, 31

The rule that, on discovery of a fraud in a contract, the defendant should abandon and avoid claiming benefit by it; and, in case of a sale of goods, on discovery of unsoundness, that a return should be made by the vendee, is undoubted and indisputable, but not applicable to cases of sale of property of no value, and when the subject purchased is not rightly an article of sale or of merchandise.—Hancock, adm'r, vs. Tucker, adm'r, 435

FREIGHT.—A charge is not proper for detention of a vessel to take on board freight where the charter party provided for its being taken free. —Pearson vs. Grice, 314

GUARDIAN AND WARD.—Where a bill is brought against his guardian by a ward, to compel him to account for certain slaves alleged to have been received by him from the estate of the father of the ward, a plea by the guardian that they had been recovered from him in an action of detinue, prosecuted by the administrator on the father's estate, constitutes a good defence.

The hires of the slaves accruing prior to the recovery by the administrator follow the title of the property, and are due to the administrator and not to the ward.

Where a bill for account is brought against a guardian and the sureties on his guardian bond, the final decree, if for the pay-

ment of money, should be so framed that it shall be enforced against the sureties only in the event that the money cannot be made out of the principal.

Where one of several wards brings his bill for account against his guardian, the other wards who may be interested in the general fund, must be made parties to the suit.—Hendry vs. Clardy, 77

HABEAS CORPUS.—The writ *habeas corpus* is not the proper method of trying the right of a negro to freedom.—Clark vs. Dick. 300

HUSBAND AND WIFE.—Property of the wife vested in the husband previous to the married woman's law, is not affected by its provisions so as to make it her separate property.

A deed of gift to a *married woman and the heirs of her body*, to the said wife and her immediate offspring, to have and to hold the property to their "*own proper use and behoof forever*," will not constitute a separate estate in her according to the principles and rules of Courts of Equity.—Tyson vs. Mattair, 107

There must be a record or inventory of the property acquired by a married woman in the Clerk's office of the county in which it is situated, within six months after its acquisition, to protect it from the husband's debts.

In the trial of the right of property asserted by a married woman through a purchase, there must be proof that it was made with her separate funds, otherwise the presumption is that it was through means furnished by her husband.

In such a trial, under the claim law, the sole issue is as to the *right of the claimant*, and he cannot object to either the judgment or execution under which the levy was made.—Price vs. Sanchez, 136

For the removal of a husband as trustee for his wife by statute, something more is required in consequence of the relation than in the case of an ordinary trustee.

In case of desertion by the husband, or of cruelty to the wife, the Court will intercept her estate which may come to his hands or in his possession so as to secure her maintenance and support, and, in such a case, remove him as trustee.

They will not remove him as trustee, in case of desertion of the wife, without cause, although the husband may not have been entirely without fault.—Abernathy vs. Abernathy, 243

Where the husband sues for the recovery of the separate property of the wife, which is secured to her by the "*married woman's law*," she must be joined as a co-plaintiff.

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A married woman cannot maintain an action at law, in her own name and alone, for the recovery of her separate property secured to her by the statute. *Query*.—If the husband has abandoned her or obstinately refuses to join her?—*Lignoski vs. Bruce*, 289

INSTRUCTION.—Where there is no bill of exceptions accompanying the record, but the instruction complained of purports to have been in writing, duly attested by the judge who presided at the trial, and it is manifestly irrelevant to the issue joined between the parties, this Court will consider and pronounce upon such instruction.

Where a promissory note had been given for the purchase of a horse, which note was afterwards transferred to a third party, who brought suit thereon against the maker, and the pleas were "failure," "partial failure" and "want of consideration," it is error in the judge below to instruct the jury, "that to sustain the defendant's plea of *fraud*, it must be proved to them that there was fraud by the payee of the note, in the sale of the horse to the maker; and that there was fraud between the assignee and the payee of the note, in the purchase of the note; and that it must be proved that the assignee was notified of the fraud between the payee and the maker in the sale of the horse before he purchased the note."—*McKay vs. Bellows*, 31

It is not every irrelevant instruction that will afford a ground for error. The instruction, to be erroneous, must be not only irrelevant, but likely to mislead the jury in the formation of their verdict.—*Milton vs. Blackshear*, 161

INTENDMENT.—The appellate Court will intend that everything necessary to sustain the verdict was proved unless the omission was taken advantage of by exception in the Court below.—*Miller & Criglar vs. Kingsbury*, 356

INTEREST.—Where the demand sued for is a *debt ex nomine*, in contradistinction to *unliquidated damages*, interest is allowable thereon from the time when the same becomes legally due and payable; and when no such time is ascertainable, then interest is allowable only from the date of an actual demand of payment, or of the commencement of the suit.—*Milton vs. Blackshear*, 162

The rule for the calculation of interest in *Dorman and Hart*, 2 Florida, 448, held inapplicable to accounts, with mutual credits, between merchant and merchant.—*Pearson vs. Grice*, 214

**JUDGMENT.**—Where there is one good count in the declaration and the record contains no bill of exceptions incorporating the evidence adduced at the trial, the legal presumption is that it was sufficient to sustain the judgment under that count.—*Miller & Criglar vs. Kingsbury*, 354

**JURISDICTION.**—The Court of Chancery has jurisdiction where accounts are to be taken and the property in controversy is encumbered by mortgages in the hands of a third party.—*Broome et al. vs. Alston, adm'r*, 307

**LIMITATIONS.**—(See Statute of Limitations.)

**MARRIED WOMEN.**—Property of the wife vested in the husband previous to the married woman's law, is not affected by its provisions so as to make it her separate property.

A deed of gift to a *married woman and the heirs of her body*, to the said wife and her immediate offspring, to have and to hold the property to their "*own proper use and behoof forever*," will not constitute a separate estate in her according to the principles and rules of Courts of Equity.—*Tyson vs. Mattair*, 107

There must be a record of inventory of the property acquired by a married woman in the Clerk's office of the county in which it is situated, within six months after its acquisition, to protect it from the husband's debts.

In the trial of the right of property asserted by a married woman through a purchase, there must be proof that it was made with her separate funds, otherwise the presumption is that it was through the means furnished by her husband.

In such a trial, under the claim law, the sole issue is as to *the right of the claimant*, and he cannot object to either the judgment or execution under which the levy was made.—*Price vs. Sanchez*, 136

Where the husband sues for the recovery of the separate property of the wife, which is secured to her by the "married woman's law," she must be joined as a co-plaintiff.

A married woman cannot maintain an action at law, in her own name and alone, for the recovery of her separate property secured to her by the statute. *Quere.*—If the husband has abandoned her or obstinately refuses to join her?—*Lignoski vs. Bruce*, 269

**MORTGAGE.**—Notice of the institution of a suit for foreclosure of a mortgage, is properly executed by handing a copy to defendant.

It is not a good defence to a suit by the assignee of the mortgage, that the assignor was insolvent.

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Nor that the mortgagor had sold part of the property with consent of the mortgagee or his assignee, without an allegation that the proceeds had been applied to the payment of the mortgage debt.

The assignee of the mortgage is by statute the proper person, and has full right to institute suit for the foreclosure.

It is not good ground for a continuance, in cases of this kind, that defendant had waited until the issues were joined before getting his witnesses or his evidence for the trial.—Wynn vs. Ely, 232

NEW TRIAL.—It is a well settled rule, in reference to the granting of new trials in the Courts of common law, that the party applying on the ground of *newly discovered evidence*, must make his vigilance apparent; for if it is left even doubtful that he knew of the evidence, or that he might, but for negligence have known and produced it, he will not succeed in his application.

On a motion for a new trial on the ground of newly discovered evidence, if the evidence proposed to be obtained be merely *cumulative*, or in corroboration of testimony to a point presented at the trial, the motion will not be granted.—Milton vs. Blackshear. 162

Where there is a confused statement in the bill of exceptions as to the rejection of material and important evidence, leaving it in doubt whether the same was actually rejected, the Court will award a new trial.—Pearson vs. Grice, 214

When there is conflicting evidence and the verdict is not manifestly against the weight of evidence, the Court will not interpose to set aside the verdict of a jury.—Tallahassee Railroad Co. vs. Macon, 239

Where a new trial is moved for on the ground of a misdirection, calculated to raise an immaterial issue, if the Court see that justice has been done between the parties and there was no evidence by which they could have been misled, they will not disturb the verdict.—Prescott vs. Johnson, 331

A new trial will not be granted, in case of conflicting testimony, when the weight of the evidence agrees with the verdict—Hooker, adm'r, vs. Tucker, adm'r, 436

NOTICE.—Notice of the institution of a suit for foreclosure of a mortgage, is properly executed by handing a copy to defendant. Wynn vs. Ely, 232

A *bond fide* purchaser for value will not be affected by any prior existing equities of which he had no notice at the time of his pur-

chase, but a "purchaser" in this connexion is one who gives a present value for the purchase (either by the payment of money or the surrender of a security.) If the consideration be founded upon a pre-existing debt, the rule does not apply.—Glinski & Gililand vs. Zawadski, 405

NUISANCE.—Neither railroads nor wharves are nuisances *per se*. They may become so without proper regulation or restriction. Geiger et al. vs. Filor et al., 325

PARENT AND CHILD.—A payment to a father as natural guardian for a child, is not valid as a defence to an action for recovery of the hires of negroes belonging to the child.

Nor will a plea be good as a defence that the father, being for a long time in possession of the child's negroes, hired them to defendant and had received the payment therefor.—Linton vs. Walker, 144

PARTIES.—Where one of several wards brings his bill for account against his guardian, the other wards who may be interested in the general fund, must be made parties to the suit.—Hendry vs. Clardy, 77

A party has his standing in a Court of equity so long as he is interested in contesting the amount to be decreed against him in favor of collateral parties, notwithstanding he may have settled with the principal creditor during the progress and pendency of the suit.—Carter vs. Davis, 133

PAYMENT.—A payment to a father as natural guardian for a child, is not valid as a defence to an action for recovery of the hires of negroes belonging to the child.

Nor will a plea be good as a defence that the father, being for a long time in possession of the child's negroes, hired them to defendant and received the payment therefor.—Linton vs. Walker, 144

PLEAS AND PLEADING.—The omission to add "similiter" or to plead to a particular count, where the issue has been joined upon other counts of the declaration, affords no ground for a writ of error.—Burk vs. Clark, 9

Formal defences are dispensed with by rule of Court, such as "*defends against the wrong and injury, actionem non*," and their use, even if improper, does not not invalidate a plea.

A plea setting up a sale of 58 head of hogs, with a delivery of 25 and refusal to deliver the remainder, was held a valid defence as

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to those not delivered, and, if there was fraud in procuring the note, no recovery could be had upon it.—*Stafford vs. Anders*, 31

Where a bill is brought against his guardian by a ward, to compel him to account for certain slaves alleged to have been received by him from the estate of the father of the ward, a plea by the guardian that they had been recovered from him in an action of detinue, prosecuted by the administrator on the father's estate, constitutes a good defence.—*Hendry vs. Clardy*. 77

In a plea to an action on a promissory note, given for the purchase of an article, it is not sufficient to state that the article purchased was unsound and unfit for use, or that fraudulent misrepresentation respecting its character had been made by the seller; there must be a distinct allegation, going to show that the defendant had suffered a loss upon the purchase.—*Jones vs. Streeter*, 83

A plea in abatement, that by the agreement the Chief Engineer should in all cases decide every question which might or could arise under the contract, is not maintainable. If pleadable, it should be in bar.—*Finnegan & Co. vs. L'Engle & Son* 613

Where any of the pleadings of either party is pronounced insufficient upon demurrer, and the party against whom the ruling is made proceeds to plead over, the act of pleading over is a waiver of his exception to the ruling, and the point will not be considered in this Court. If he desires to avail himself of the exceptions, he must rest upon the ruling and make that the ground of his appeal or writ of error.—*Hooker vs. Johnson*. 453

PRACTICE.—Where the instruction of the Judge below is relevant to the issue joined and exception is taken thereto, all the evidence upon which the instruction is based, must be incorporated in the bill of exceptions which accompanies the record.

In a common law suit, the only means of bringing before the Appellate Court the evidence used in the Court below, is by incorporating it in the bill of exceptions which accompanies the record.

It is a settled rule of law, that every presumption is in favor of the ruling of the Court below, therefore where a party excepts to such ruling, and fails to bring up the evidence upon which the ruling is based, this Court will refuse to consider the exception.—*Burk vs. Clark*. 9

Where the error assigned is the refusal of the Court below to grant a new trial, in order to enable this Court to judge of the correctness of that ruling, all the evidence used at the trial must be brought up by a bill of exceptions.—*Tompkins vs. Eason*, 14

Where exception is taken to an instruction given by the Judge below, it ought, with the evidence upon which it is based, to be incorporated in the bill of exceptions accompanying the record—*Fash vs. Clark & Ferris*, 16

Where a plaintiff dies and the suit is revived by *scire facias*, it is to be proceeded with in terms of the law as to the making of defences as if he had not died, and the defendant is not entitled to an appearance and trial term, as if the case had been commenced by the party newly made. If judgment is had by *nil dicu* in the Court below, the defendant should apply, if he has a good defence, to pen the judgment and be permitted to plead, and cannot make his application to this Court.—*Parker et al. vs. Hendry*, 53

Under the provisions of our statute, the defendant in a criminal case has a right to the concluding argument before the jury, when he introduces no testimony on the trial.

The statute which secures to the defendant in criminal cases the right to the concluding argument, is mandatory in its character, and a denial of the right by the Court may be the subject of a bill of exceptions.—*Heffron vs. The State*, 75

Where a plea in bar to the original bill has been sustained upon demurrer, a supplemental bill, filed afterwards, and before the final cases confessing and avoiding the matters set up in the plea as a defence, ought to be answered by the defendant, and it is error to dismiss it upon demurrer.—*Hendry vs. Clardy*, 77

It is a well settled rule of practice, both in the English and American Courts, that on demurrer the Court will consider the whole record and give judgment for the party who on the whole appears to be entitled to it.—*Miller & Criglar vs. Kingsbury*, 356

A defendant against whom a default has been taken for want of a plea is not absolutely out of court, but still retains the right to appear upon an inquest of damages, to cross examine the plaintiff's witnesses to introduce evidence in mitigation of damages and to address the jury thereupon.—*Watson vs. Seat & Crawford*, 446

**PRESUMPTION.**—Where there is one good count in the declaration and the record contains no bill of exceptions incorporating the evidence adduced at the trial, the legal presumption is that it was sufficient to sustain the judgment under that count.—*Miller & Criglar vs. Kingsbury*, 356

**PRINCIPAL AND SURETY.**—Where a bill for account is brought against a guardian and the sureties on his guardian bond, the final decree should be so framed that it shall be en-

forced against the sureties only in the event that the money cannot be made out of the principal.—Hendry vs. Clardy, 71

PROCESS.—A Circuit Judge, under the provisions of the act of 1844, has full power, either in term time or vacation, to correct, restrain and control the process of a Court of law, and no resort is necessary to the powers of the Court of Chancery in such cases, unless arising from the operation of independent equities apart from the process.—Robinson vs. Yon, 359

PROMISSORY NOTES.—The establishment of a lost note under the statute is no bar to any defence that might be set up to the original note.

Where a promissory note has been negotiated before due under circumstances which, at common law, would authorize an inquiry into the consideration thereof, the same enquiry may be made under a plea of failure of consideration, filed on oath, under the statute.

Where the failure of consideration of a promissory note is filed under oath, according to the statute, the statute throws the onus of proving the consideration thereof upon the plaintiff.—Prescott vs. Johnson, 391

RECORD.—The Court will not receive the transcript of a record badly made out, with interlineations, but will require a new and complete record.—Pearson vs. Grice, 214

The Court should take care that its records should be protected as far as possible from obscene expressions.—Abernathy vs. Abernathy, 343

REPLEVIN.—A defendant in execution, after judgment in replevin, cannot sue out another writ of replevin to prevent the execution of the writ against himself and procure a restoration of the property. The Court, on application, will supersede the writ if not returned, or set it aside as irregularly issued if it be returned.—Tyson vs. Bowden, 61

The act of 1844 prohibits Sheriff's sales, except upon the four sale days therein named, provided that when the levy is upon personal property, the replevy bond required by the statute shall have been given.

Such bond is not necessary where the levy has been upon real estate, which is not in its nature the subject of replevy.

The statute of 1855 does not allow a second replevy by the sureties in the first replevy bond.—Robinson vs. Yon, 350

RIPARIAN OWNER.—The law of 1856, to benefit commerce, was not designed to give the original proprietor of a city, or to the

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vendees of his right to the street, the land between high and low water mark at their termination. By the law, this belongs to the city so long as the street exists, with a right to the owners of lots afterwards on its abandonment.—Geiger et al. vs. Filor et al., 325

**ROADS AND HIGHWAYS.**—The fact of a road having been an old one has no weight in determining an application for the establishment of a road under the statute.

A petition for the establishment of a road under the statute should be signed by twelve or more householders, inhabitants of the county, praying for the establishment of a neighborhood or settlement' road, and not by an individual representing his own interests.—Bradford vs. Cole, 263

**SCIRE FACIAS.**—Where a plaintiff dies and the suit is revived by *scire facias*, it is to be proceeded with in terms of the law as to the making of defences as if he had not died, and the defendant is not entitled to an appearance and trial term, as if the case had been commenced by the party newly made. If judgment is had by *nil dicit* in the Court below, the defendant should apply, if he has a good defence, to open the judgment and be permitted to plead, and cannot make his application to this Court.—Parker et al. vs. Hendry, 53

**SHERIFF SALES.**—The act of 1844 prohibits Sheriff's sales, except upon the four sale days therein named, provided that when the levy is upon personal property, the replevy bond required by the statute shall have been given.

Such bond is not necessary where the levy has been upon real estate, which is not in its nature the subject of replevy.—Robinson vs. Yon, 350

**SLAVE.**—The bailee of the slave upon hire is bound to bestow that degree of care and attention which a humane master would bestow on his own servant under the like circumstances.—Tallahassee Railroad Co. vs. Macon. 299

The writ of *habeas corpus* is not the proper method of trying the right a negro to freedom.—Clark vs. Dick, 300

**SPECIFIC PERFORMANCE.**—Where the object of the bill is to compel the "specific performance" of a contract, if the prayer be denied, (as a general rule,) the bill will be dismissed; but there are exceptional cases, as where equity is found to have arisen between the parties to the contract growing out of its pecu-

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liar character or nature. In such case, the bill may be retained for the purpose of having that equity adjusted. *Glinaki & Gilliland vs. Zawadski*, 405

STATUTES.—It is a rule, in construing statutes, that the original act and the amendment is to be viewed as one act, and that no portion of either is to be declared inoperative, if they can be made to stand together without wresting the words from their appropriate meaning.—*Harrel vs. Harrell*, 46

Where the provisions of an act are adopted by a *general reference*, the act will receive a more liberal construction than if originally passed with reference to the particular subject.

Where a statute has been entered with special reference to a *particular* subject and by another statute its provisions are directed in *general terms* to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the *new* subject.—*Jones vs. Dexter*, 276

STATUTE OF LIMITATIONS.—The general rule is, that the statute of limitations will not avail a party in whom the law raises a trust, as against the *cestui que* use. *Broome et al. vs. Alston, adm'r*, 307

TRUST AND TRUSTEE.—For the removal of a husband as trustee for his wife by statute, something more is required in consequence of the relation than in the case of an ordinary trustee.

In case of desertion by the husband, or cruelty to the wife, the Court will intercept her estate which may come to his hands or in his possession so as to secure her maintenance and support, and, in such a case, remove him as trustee.

They will not remove him as trustee, in case of desertion of the wife, without cause, although the husband may not have been entirely without fault.—*Abernathy vs. Abernathy*, 243

The general rule is, that the statute of limitations will not avail a party in whom the law raises a trust, as against the *cestui que* use.

A party standing in the nature of a trustee by a construction of law may purchase with his own means an outstanding lien upon the trust property in his hands.—*Broome et al. vs. Alston, adm'r*, 307

VARIANCE.—A variance between the amount of damages laid in

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- the *praecipe* and that in the declaration, affords no ground upon which to predicate a writ of error.—McKay vs. Frieble, 21
- VENDOR AND PURCHASER.—A sale of personal property as of hogs, is not complete without delivery, identification or discrimination, and it is the duty of the vendor to make this, unless otherwise agreed.—Stafford vs. Anders, 34
- Where the object of the bill is to compel the "specific performance" of a contract, if the prayer be denied, (as a general rule,) the bill will be dismissed; but there are exceptional cases, as where equity is found to have arisen between the parties to the contract growing out of its peculiar character or nature. In such case, the bill may be retained for the purpose of having that equity adjusted.
- Where one contracts to purchase real estate and proceeds to erect improvements thereon, if compensation therefor be decreed him, the *amount* is to be based upon the actual *value* of the improvements, or, at a farthest, upon a *reasonable allowance*, and not upon the amount expended.
- A *bona fide* purchase for value will not be affected by any prior existing equities of which he had no notice at the time of his *purchase*, but a "purchaser" in this connexion is one who gives a *present value* for the purchase (either by the payment of money or the surrender of a security.) If the consideration be founded upon a pre-existing debt, the rule does not apply.—Glinski and Gilliland vs. Zawadski, 406
- VERDICT.—The Supreme Court will not remand a cause, simply on the ground of a *slight excess* in the amount of the verdict.—Milton vs. Blackshear, 163
- Where there is conflicting evidence and the verdict is not manifestly against the weight of evidence, the Court will not interpose to set aside the verdict of a jury.—Tallahassee Railroad Co. vs. Macon, 299
- The appellate Court will intend that everything necessary to sustain the verdict was proved unless the omission was taken advantage of by exception in the Court below.—Miller & Criglar vs. Kingsbury, 366
- Where a new trial is moved for on the ground of misdirection, calculated to raise an immaterial issue, if the Court see that justice has been done between the parties and there was no evidence by which they could have been misled, the will not disturb the verdict.—Prescott vs. Johnson, 391

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**WAIVER.**—If a party, after judgment upon demurrer is given against him, goes on to amend his pleadings and makes an issue to the country, he thereby waives his exceptions to the judgment upon the demurrer, and will not be permitted to assign it for error in the Appellate Court.—Ellison vs. Allen, 395

**WIDOW.**— See Dowress.

**WILL.**—A will by a testator devising "to his wife, her heirs and assigns, all the property, goods, chattels, rights and credits of which he may be possessed for and during her natural life, except as hereafter provided," and that provision was to pay \$2,000 to his nephew and relative, confers the absolute estate and interest in the wife, subject to the proviso.—Merritt and wife vs. Brantly, 235

**WITNESS.**—(On the trial of a suit instituted to recover the price of cattle sold, a witness was asked whether he did or did not have stock of cattle running with the stock of Alderman Carlton, known as the James E. Hendry stock, and whether or not it was formerly of the same stock: Held, the question was inadmissible.—Parker et al. vs. Hendry, adm'r, 450

Where a witness has a joint interest with the party who calls him, either in the subject matter to be recovered or in the contract as a general partner, joint or part owner or joint-contractor, by which he has an interest in the very thing claimed, or in the money to be recovered or in the costs incidental to the suit, he is incompetent to give evidence for that party.

Where two enter into an agreement to share the profits of an enterprise, involving a contribution of labor, if a third party enter into a similar agreement with one of them to share in his portion of the profits and a suit arises between the two involving the partition under the original agreement, this third party is incapacitated by interest from testifying as a witness in behalf of him with whom he has made the sub-contract.—Hooker vs. Johnson, 453

**WRIT OF ERROR.**—The omission to add the "similiter" or to plead to a particular count, where the issue has been joined upon other counts of the declaration, affords no ground for a writ of error.—Burk vs. Clark, 9

A variance between the amount of damages laid in the *præcipe* and that in the declaration, affords no ground upon which to predicate a writ of error.—McKay vs. Friebele, 21

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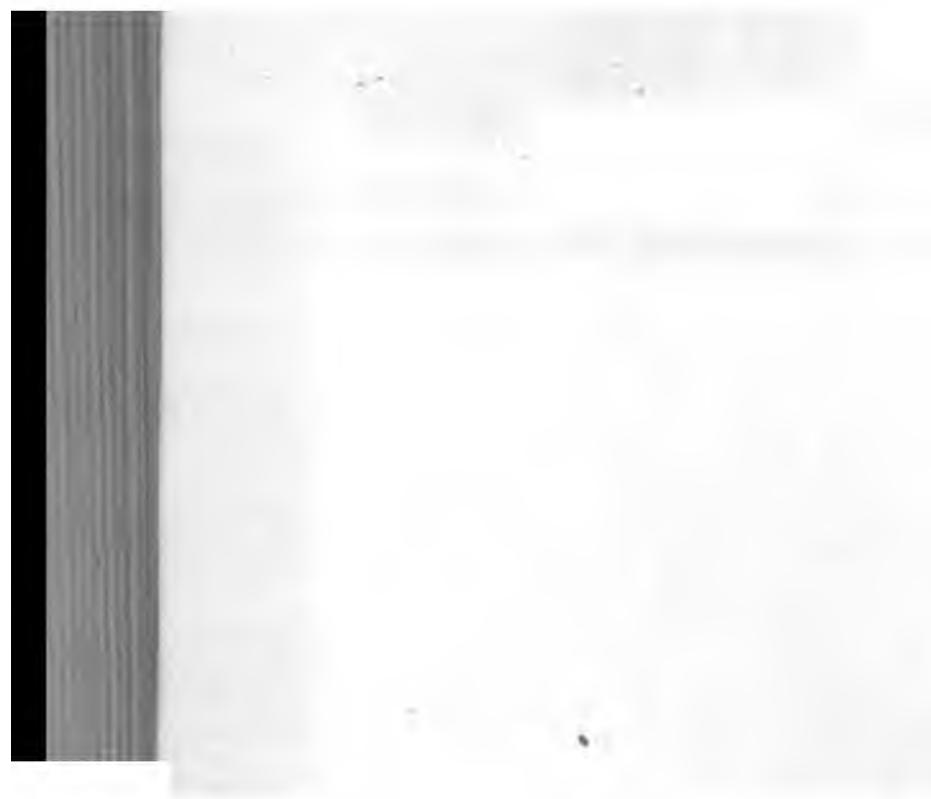
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Where any of the pleadings of either party is pronounced insufficient upon demurrer, and the party against whom the ruling is made proceeds to plead over, the act of pleading over is a waiver of his exception to the ruling, and the point will not be considered in this Court. If he desires to avail himself of the exceptions, he must rest upon the ruling and make that the ground of his appeal or writ of error.—Hooker vs. Johnson,

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